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PACKAGE BOMBS, FOOTLOCKERS, AND LAPTOPS: WHAT THE DISAPPEARING CONTAINER DOCTRINE CAN TELL US ABOUT THE FOURTH AMENDMENT

CYNTHIA LEE*

In the 1970s, the Court announced in a series of cases that police officers with probable cause to believe contraband or evidence of a crime is within a container must obtain a warrant from a neutral, detached judicial officer before searching that container. In requiring a search warrant, the Container Doctrine put portable containers on an almost equal footing with houses, which enjoy unquestioned Fourth Amendment protection.

This Article demonstrates that the Container Doctrine is fast becoming a historical relic as the Court expands the ways in which law enforcement officers can search containers without first obtaining a warrant issued by a judicial officer. Studying the numerous ways in which the Court has undermined the Container Doctrine is useful for several reasons. First, the erosion of the Container Doctrine is emblematic of a more tectonic jurisprudential shift—the Court’s movement away from the Warrant

* I have benefited greatly from the helpful comments of numerous individuals. First and foremost, I want to thank Nirej Sekhon, Chip Lupu, Tom Colby, Mary Fan, Jenny Roberts, Karen Thornton, and Stephen Lee for taking the time to provide me with tremendously helpful comments on this paper. I also thank Ed Swaine, John Duffy, Jeff Manns, Brian Galle, Paul Butler, Alan Morrison, Charlie Craver, Bob Cottrol, Orin Kerr, Jefferson Powell, and other colleagues at the George Washington University Law School who provided me with helpful feedback when I presented this paper to the faculty on June 30, 2010. I thank Eang Ngov and Jonathan Kang who assisted me when I presented an early draft of this paper as a work-in-progress at CAPALF (the Conference of Asian Pacific American Law Faculty) at the University of California at Davis on March 28, 2009. I thank Julian Cook who served as a commentator on my paper when I presented it at LatCrit in Washington, DC in October 2009. I thank Tamara Lawson, Nadia Soiree, John Kang, and Lauren Gilbert for helpful comments when I spoke at St. Thomas University School of Law in Miami Gardens, Florida in January 2010 as part of St. Thomas University’s Distinguished Speaker Series. Additional thanks to Josephine Ross, Rachel Rebouche, and Wayne Logan for their feedback on this paper. I thank Jason Hawkins, Jane Kim, Meredith Madden, Benjamin McIntyre, Christine Mundia, and Lam Nguyen for excellent research assistance. I also thank Jonathan Sabo, Morgan Tilleman, and the other Northwestern University law students on the *Journal of Criminal Law and Criminology* who assisted in the publication of this Article.

Preference view (the belief that the Fourth Amendment expresses a preference for warrants) and its gradual embrace of the Separate Clauses (or Reasonableness) view of the Fourth Amendment. Second, the Court's willingness to allow a growing number of container searches without warrants suggests a deep judicial ambivalence about the effectiveness of warrant formalism. Third, the demise of the Container Doctrine, and its corresponding impact on the poor and homeless, reflects a troubling indifference to non-majoritarian interests.

This Article proceeds in four parts. Part II examines the longstanding debate over whether the Fourth Amendment expresses a preference for warrants or merely requires that searches and seizures not be unreasonable. Part III provides background on the Container Doctrine and discusses its rationales. Part IV examines the myriad ways in which police can lawfully search a container without a warrant. The Court's increasing willingness to tolerate warrantless searches of containers mirrors its gradual embrace of the Separate Clauses or Reasonableness view of the Fourth Amendment, the position that all the Fourth Amendment requires is that searches and seizures be reasonable. Part V provides a discussion of why this movement away from warrants towards reasonableness in the container search context is problematic and what might be done about the situation. This Article argues that not requiring warrants for most container searches hurts the poor and, by implication, poor communities of color, more so than the wealthy. To rectify this unfairness, this Article proposes an additional layer of review in container search cases where the government claims the warrantless search falls within an exception to the warrant requirement. Borrowing from a small slice of the Court's equal protection jurisprudence, its "rational basis with bite" cases, this Article proposes that courts be non-deferential and rigorous when engaging in reasonableness review. In other words, reviewing courts should employ reasonableness review "with teeth."

I. INTRODUCTION

In October 2010, two packages mailed from Yemen and addressed to Jewish synagogues in Chicago were intercepted and found to contain explosive material.¹ One of the package bombs was found on a UPS plane that had stopped in England.² The other bomb, hidden inside a printer cartridge, was intercepted at a FedEx facility in Dubai.³ Earlier in October,

¹ Peter Finn, Greg Miller, & Anne E. Kornblut, *Two Packages Sent from Yemen Held Explosives*, WASH. POST, Oct. 30, 2010, at A1.

² *Id.*

³ Peter Finn & Mary Beth Sheridan, *Bomb's Ingredients Point to Saudi Terrorist*, SAN JOSE MERCURY NEWS, Oct. 31, 2010, at A5.

Farooque Ahmed, a naturalized U.S. citizen from Pakistan, was arrested for conspiring to blow up Metrorail stations in the Washington, D.C. area.⁴ Unattended backpacks and duffel bags on city streets in Washington, D.C. lead to mass evacuations and street closures as authorities seek to make sure the seemingly abandoned containers do not contain explosives.⁵

We live in a time of heightened security. After the September 11, 2001 attacks on the World Trade Center and the Pentagon, the 2004 train bombings in Madrid, Spain, the 2005 attacks on the London transit system, the 2008 bombing attacks in Mumbai, India, the attempted bombing of a Northwest Airlines flight from Amsterdam to Detroit by a Nigerian citizen with plastic explosives hidden in his underwear on December 25, 2009 (the attempted Christmas Day bombing), and the car bomb found in New York's Times Square in May 2010, the threat of another terrorist attack is a very real concern. The desire to give government officials the ability to prevent the loss of human life from such an attack is completely understandable.

In light of valid security concerns, one might wonder why anyone should care about an almost forgotten doctrine that protects portable containers from warrantless governmental searches. In a series of cases in the 1970s, the Court announced, in a rule I call the Container Doctrine, that police officers with probable cause to believe contraband or evidence of a crime is within a container may seize the container, but cannot open and search it without first obtaining a warrant from a neutral, detached judicial officer.⁶ Over the ensuing years, the Court has gradually eroded the Container Doctrine, allowing police officers to search portable containers without a warrant under a number of exceptions to the warrant requirement.

In this Article, I demonstrate that the Container Doctrine is fast becoming a historical relic as the Court expands the ways in which law enforcement officers can search containers without first obtaining a warrant issued by a judicial officer. Studying the numerous ways in which the Court has undermined the Container Doctrine is useful for several reasons. First, the erosion of the Container Doctrine is emblematic of a more tectonic jurisprudential shift—the Court's movement away from the Warrant Preference view (the belief that the Fourth Amendment expresses a

⁴ Annie Gowen & Spencer S. Hsu, *Terror Suspect's Anger Stood Out*, WASH. POST, Oct. 30, 2010, at B1.

⁵ Martin Well, *Suspicious Bags Around NW Sound False Alarm*, WASH. POST, Oct. 30, 2010, at B3; Rick Rojas, *Suspicious Items Cause Disruptions in NW D.C.*, WASH. POST, July 1, 2010, at B5 (noting that a gray suitcase left near a construction zone and a contraption made of pipe resulted in the closure of several blocks in Northwest D.C. to both pedestrian and car traffic).

⁶ *Arkansas v. Sanders*, 442 U.S. 753, 763–64 (1979); *United States v. Chadwick*, 433 U.S. 1, 15 (1977).

preference for warrants)⁷ and its gradual embrace of the Separate Clauses (or Reasonableness)⁸ view of the Fourth Amendment. Second, the Court's willingness to allow a growing number of container searches without warrants suggests judicial ambivalence about the effectiveness of warrant formalism. Third, the demise of the Container Doctrine, and its corresponding impact on the poor and homeless, reflects a troubling indifference to non-majoritarian interests.

Why should we care about this erosion of Fourth Amendment protection for portable containers? We should care because portable containers, like houses, are repositories for highly personal and private effects. As some have argued, in protecting expectations of privacy, the Fourth Amendment protects a right to "control over knowledge about oneself."⁹ What we keep in our purses, wallets, briefcases, and suitcases can reveal a great deal about our lives. Government officials should not be able to search our effects without a good reason. Those of us who use laptops and smartphones should be concerned when the government starts equating laptops and cellphones with other portable containers that can be searched without a warrant, as it has at the international border.¹⁰

This Article proceeds in four parts. In Part II, I examine the longstanding debate over whether the text of the Fourth Amendment expresses a preference for warrants or merely requires that searches and seizures be reasonable. For much of the twentieth century, the Supreme Court supported the Warrant Preference view of the Fourth Amendment—the view that the Fourth Amendment requires police to obtain a warrant before searching unless a clearly delineated exception to the warrant requirement applies. In the last ten to twenty years, however, an increasingly conservative Court has moved toward the Separate Clauses or Reasonableness view of the Fourth Amendment, the view that all the Fourth Amendment requires is reasonableness.¹¹

⁷ See *infra* text accompanying notes 15–20.

⁸ See *infra* text accompanying notes 29–31.

⁹ Michael D. Granston, Note, *From Private Places to Private Activities: Toward a New Fourth Amendment House for the Shelterless*, 101 YALE L.J. 1305, 1322 (1992).

¹⁰ See *infra* Part IV.E. (discussing warrantless, suspicionless searches of laptop computers and cell phones at the border).

¹¹ While most scholars refer to this approach as the Reasonableness view of the Fourth Amendment, I use the terms "Reasonableness" and "Separate Clauses" interchangeably because proponents of this view see the Fourth Amendment as having two separate clauses. They see the "and" in the middle of the Fourth Amendment as separating the two clauses of the Fourth Amendment such that one clause requires reasonableness and the other merely specifies the requirements for a valid warrant. They thus conclude that all the Fourth Amendment requires is that searches and seizures not be unreasonable. See *infra* Part II.B.

In Part III, I provide background on the Container Doctrine and discuss its rationales. Born during the 1970s in the heyday of the Warrant Preference view, the Container Doctrine reflects the understanding that it is preferable to have a neutral and detached judicial officer, rather than a police officer, make the probable cause determination. In requiring police officers to obtain a warrant before searching a container, the Container Doctrine not only reflected the Court's embrace of the Warrant Preference view, it also put portable containers used to carry personal effects on the same footing as private homes, which as a general rule cannot be searched without a warrant.

In Part IV, I examine the myriad ways in which police can lawfully search a container without a warrant. Without formally abandoning the Container Doctrine except in the context of automobile searches, the Court has steadily eroded it by permitting police officers to search containers without a warrant under various exceptions to the warrant requirement. The Court's increasing willingness to tolerate warrantless searches of containers mirrors its gradual embrace of the Separate Clauses or Reasonableness view of the Fourth Amendment. The Court's path from warrant preference to reasonableness, however, has not been straight or smooth. The Court has flip-flopped over the years, at times embracing warrants and at other times embracing reasonableness. As recently as 2009, the Court expressed strong support for the Warrant Preference view.¹² Overall, however, the trajectory has been away from requiring warrants in favor of mere reasonableness review. This back-and-forth is also seen in the Court's container search cases.

In Part V, I discuss why the movement away from warrants towards reasonableness in the container search context is problematic and what might be done about the situation. I argue that reasonableness review, as currently applied, tends to be too deferential to the government and wildly indeterminate. I also argue that dispensing with warrants for container searches disproportionately hurts the poor in general and poor communities of color in particular.

To rectify these problems, I propose an additional layer of review in container search cases. When the government claims that a warrantless container search was justified by an exception to the warrant requirement, in addition to determining whether the requirements of the exception have

for more detailed explanation of the Separate Clauses or Reasonableness view of the Fourth Amendment.

¹² *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”).

been satisfied, the reviewing court must scrupulously evaluate the overall reasonableness of the search. Reasonableness review comports with the Fourth Amendment's command that searches and seizures not be unreasonable. The reasonableness review I propose, however, is not the run-of-the-mill, ultra-deferential reasonableness review that courts currently employ. Borrowing from a small slice of the Court's equal protection jurisprudence—its “rational basis with bite” cases—I propose that courts employ non-deferential, rigorous reasonableness review. In other words, I propose that reviewing courts employ reasonableness review with teeth. While I believe the Warrant Preference view of the Fourth Amendment is the view that most appropriately protects the right to be free from unreasonable searches and seizures, I realize that the current Court is unlikely to go back to a strong embrace of warrants anytime soon.¹³ Therefore, even though I agree with much that critics of the Reasonableness approach have to say, I make my argument within the Separate Clauses framework in order to provide a pragmatic suggestion for protecting privacy interests in containers.

II. WARRANTS OR REASONABLENESS: THE DEBATE OVER THE MEANING OF THE FOURTH AMENDMENT

The Fourth Amendment to the U.S. Constitution provides,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁴

For years, legal scholars and Supreme Court Justices have debated the meaning of these words. Over time, two competing interpretations of the

¹³ Tellingly, Justice Stevens, who retired from the Supreme Court in June 2010, authored the only two decisions between 2000 and the drafting of this Article in which the Court explicitly embraced the Warrant Preference view, and one of these cases involved the warrantless search of a home where warrantless searches have traditionally been viewed with suspicion. *See Gant*, 129 S. Ct. at 1716 (“Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”); *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (“[O]ur cases have firmly established the ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable. . . .”).

¹⁴ U.S. CONST. amend. IV.

Fourth Amendment have emerged: (1) the Warrant Preference view, and (2) the Separate Clauses (or Reasonableness) view.

A. THE WARRANT PREFERENCE VIEW

Under the Warrant Preference view, police must obtain a warrant based upon probable cause before conducting a search unless an exception to the warrant requirement applies.¹⁵ Proponents of the Warrant Preference see the two clauses within the Fourth Amendment as interconnected, one giving meaning to the other.¹⁶ Thus, under this approach, whether a search is reasonable turns on whether police went to a judicial officer before the search to obtain a search warrant. Under the Warrant Preference view, a search warrant is generally required unless a specifically delineated exception to the warrant requirement applies.¹⁷

Adherents of the Warrant Preference view emphasize the importance of having a neutral, detached judicial officer make the probable cause

¹⁵ See, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 396–97 (1974) (“[T]he principal check designed against the arbitrary discretion of executive officers to search and seize was the requirement of a ‘search warrant exacting in its foundation and limited in scope’; and consequently . . . a search is ‘unreasonable’ unless a warrant authorizes it, barring only exceptions justified by absolute necessity.”); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 928 (1997) (noting that the Warrant Preference view “posits that police must ordinarily obtain a warrant prior to an intrusion, unless compelling reasons exist for proceeding without one”); George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1833 (1997) (defending the Warrant Preference view on doctrinal and historical grounds); see also *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) (“When the Fourth Amendment outlawed ‘unreasonable searches’ and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is ‘unreasonable’ unless a warrant authorizes it, barring only exceptions justified by absolute necessity.”); *Harris v. United States*, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting) (“[W]ith minor and severely confined exceptions, inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate’s authority expressed through a validly issued warrant.”). David Steinberg, in contrast, argues that the Warrant Preference view is not supported by historical sources and that the Framers of the Fourth Amendment sought to require warrants only for entries into the home, not other places. David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 264–65 (2005).

¹⁶ Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 203 (1993) (noting that those who favor the Warrant Preference view contend that “the Warrant Clause modifies the first clause—a reasonable search depends on the authorization of a valid warrant”).

¹⁷ See *Gant*, 129 S. Ct. at 1716 (“Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”).

determination—the decision that there are reasonable grounds to believe there is evidence of a crime in the place to be searched—rather than letting the police officer make this determination.¹⁸ Having a neutral judicial officer conduct ex ante review of a police officer's decision to search is particularly important because the officer is not a neutral party in the war on crime. In seeking to prevent and deter crime, the officer may see probable cause when probable cause is lacking. Requiring a warrant in most cases helps to constrain executive power, one of the key considerations that motivated the Framers to include the Fourth Amendment in the Bill of Rights.¹⁹ For much of the twentieth century, the Court embraced the Warrant Preference view of the Fourth Amendment.²⁰

¹⁸ *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (“The judicial warrant . . . provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer ‘engaged in the often competitive enterprise of ferreting out crime.’”).

¹⁹ Maclin, *supra* note 15, at 970–71; *see also* Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 298 (1993) (noting that “the model based upon the Warrant Clause does a better job of addressing the two fundamental evils that concerned the Framers,” the evil of suspicionless searches and seizures and excessive branch discretion).

²⁰ *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 559 (1999) (“For most of [the twentieth] century, the Supreme Court has endorsed what is now called the ‘warrant-preference’ construction of Fourth Amendment reasonableness, in which the use of a valid warrant . . . is the salient feature in assessing the reasonableness of a search or seizure.”); Maclin, *supra* note 16, at 204 (noting that “[t]he warrant preference view grew in stature during the latter half of the 1960’s and the early 1970’s”); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 386 (1988) (“Prior to *Camara* [decided in 1967], fourth amendment analysis had a relatively high amount of predictability: the Court presumed that a warrant based on probable cause was required before the police could perform a search or arrest.”); James J. Tomkovicz, *California v. Acevedo: The Walls Close In on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1124 (1992) (“For most of the twentieth century, the Court has proclaimed its faith in the principle of neutral judicial screening of executive decisions to search.”); *see also Gant*, 129 S. Ct. at 1716 (“Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”); *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (“A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement.”); *Maryland v. Dyson*, 527 U.S. 465, 466 (1999) (“The Fourth Amendment generally requires police to secure a warrant before conducting a search.”); *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (“Time and again, this Court has observed that searches and seizures conducted outside the warrant process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically and well delineated exceptions.”); *United States v. Karo*, 468 U.S. 705, 717 (1984) (“Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule.”); *United States v.*

In requiring law enforcement agents to obtain a warrant based on probable cause before searching a container, the Container Doctrine situated itself clearly with the Warrant Preference approach to the Fourth Amendment. Requiring warrants for container searches was a bright line rule that was simple for an officer in the field to apply. The Container Doctrine also provided clear guidance to litigants and courts. Moreover, because the Container Doctrine required an *ex ante* judicial determination of probable cause, it had the advantage of interposing a neutral third party's judgment on top of the law enforcement agent's determination that there were sufficient grounds to justify opening the container and intruding upon the container owner's expectations of privacy. *Ex ante* review had the further advantage of avoiding "the danger that the impartiality of a subsequent evaluation [would] be compromised by the evidence uncovered during the search in question."²¹

One problem with warrants is that simply requiring a warrant is often not sufficiently protective of Fourth Amendment interests. As Yale

Ross, 456 U.S. 798, 825 (1982); *New York v. Belton*, 453 U.S. 454, 457 (1981) ("It is a first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so."); *Chadwick*, 433 U.S. at 9 ("The judicial warrant has a significant role to play [in determining whether a search or seizure is reasonable] in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'"); *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971) ("[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'"); *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

²¹ Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531, 553 (1997); see also Bryan D. Lammon, Note, *The Practical Mandates of the Fourth Amendment: A Behavioral Argument for the Exclusionary Rule and Warrant Preference*, 85 WASH. U. L. REV. 1101 (2007) (arguing that requiring judges to determine the legality of a search in an *ex ante* warrant proceeding results in more accurate determinations of legality than having judges determine the lawfulness of a search through *ex post* reasonableness review). But see Andrew J. Wistrich, Chris Guthrie, & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1317 (2005) (finding no statistically significant difference between *ex ante* and *ex post* judicial assessments of probable cause). Another advantage of the warrant process is that it protects the innocent as well as the guilty. Lewis R. Katz, *The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement*, 36 CASE W. RES. L. REV. 375, 384 (1986) ("Unlike the exclusionary rule, which initially offers rewards only to the guilty, the warrant process offers its protection to innocent and guilty alike.") (footnotes omitted).

Kamisar has noted, getting a warrant to search or arrest is “notoriously easy.”²² At some courthouses, magistrates spend less than one minute per warrant application.²³ One study found that the average length of time a magistrate spends reviewing a warrant application is two minutes and forty-eight seconds.²⁴

Not surprisingly, the vast majority of warrant applications are approved.²⁵ Even in courthouses where some magistrates take their duties seriously and subject warrant applications to more rigorous scrutiny, police officers are able to get virtually all of their warrant applications approved by engaging in magistrate shopping—seeking out magistrates who are known to routinely issue warrants sought by the police.²⁶ In one jurisdiction, although any one of a number of magistrates can review and issue search warrants, only a few magistrates end up handling the lion’s share of search warrant applications because officers know which magistrates are known for “being liberal in granting search warrants.”²⁷ Given the ease with which police officers can obtain a warrant, some scholars have lamented that “[a] search warrant now generally offers little if any protection against governmental invasions of private property and serves primarily to obviate adversarial challenge to the government’s claimed reason for searching.”²⁸

²² Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather Than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565, 570 (1983).

²³ *Id.*

²⁴ RICHARD VAN DUIZEND, ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 31 (1984).

²⁵ Kamisar, *supra* note 22, at 570 n.32. *But see* Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 923–30 (1986) (discussing empirical research on the search warrant process showing that most warrants are successful in discovering at least some of the evidence sought in the warrant application).

²⁶ Paul Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process*, 22 CRIM L. BULL. 405, 418–19 (1986) (stating that at least one person in each of the seven jurisdictions studied told researchers, “There are some judges who will sign anything”).

²⁷ Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 227–28 (2000).

²⁸ Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment’s Principled Protection of Privacy*, 60 RUTGERS L. REV. 575, 580 (2008); *see also* Christopher Slobogin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, 22 MICH. J. INT’L L. 423, 430 (2001) (noting that only five percent of warrants that are issued are subsequently found invalid).

B. THE SEPARATE CLAUSES OR REASONABLENESS VIEW

Over the last two decades, the Supreme Court has increasingly embraced the Separate Clauses or Reasonableness view of the Fourth Amendment.²⁹ Proponents of the Separate Clauses view focus on the fact that the text of the Fourth Amendment contains two clauses, separated by the word “and.” The first clause (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”) is the Reasonableness Clause, which directs that all searches and seizures must be reasonable. The second clause (“and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”) is the Warrant Clause, which specifies the requirements for a valid warrant. Separate Clauses proponents see these two clauses as separate and completely independent. Accordingly, under the Separate Clauses view, the Fourth Amendment does not require or express a preference for warrants. All the Fourth Amendment requires is that searches and seizures be reasonable.³⁰ If a warrant is sought, it must be

²⁹ See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (“[T]he ultimate touchstone of the Fourth Amendment is reasonableness . . .”) (internal quotation omitted); *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (“The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by [balancing].”); *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (“[The Fourth Amendment’s] ‘central requirement’ is one of reasonableness.”); *Soldal v. Cook County*, 506 U.S. 56, 71 (1992) (“[R]easonableness is still the ultimate standard under the Fourth Amendment.”); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (“The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.”).

³⁰ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (arguing that the Fourth Amendment requires searches and seizures to be reasonable, and that it does not require warrants, probable cause, nor the exclusion of evidence); see also TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 41 (1969) (“[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants.”); Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1280–93 (2010) (arguing that reasonableness, not warrants nor suspicion, serves as the constitutional touchstone for all governmental searches); Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 8 (2007) (finding arguments in favor of the Reasonableness approach more persuasive than arguments in favor of the Warrant Preference approach). But see Davies, *supra* note 20, at 736 (“The Framers never meant to create a relativistic notion of ‘reasonableness’ as a global standard for assessing warrantless intrusions by officers.”); Maclin, *supra* note 16 (arguing that the central meaning of the Fourth Amendment is a distrust of police power and discretion, not reasonableness). For additional critiques of Amar’s argument, see WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–1791, at 773–77 (2009) (arguing that Amar has misread or ignored the available historical evidence); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down That Wrong Road Again,”* 74 N.C. L. REV. 1559 (1996) (critiquing Amar’s approach to criminal procedure as historically and theoretically

supported by probable cause, oath, or affirmation, and specify with particularity the places to be searched and the items to be seized.³¹

III. THE CONTAINER DOCTRINE

When one hears the word “container,” one usually thinks of portable containers that can hold one’s personal belongings, such as suitcases, backpacks, and purses. This also seems to be what the Supreme Court has in mind when it uses the term in its Fourth Amendment jurisprudence.³²

The Court, however, has defined the term “container” much more expansively, providing that a container is “any object capable of holding another object.”³³ Under this definition, a jacket with pockets is a container because it is an object capable of holding other objects.³⁴ Perhaps less obviously, a house is a container under this definition, since it too is an object capable of holding another object. A car is a container since it is an object capable of holding another object. Even the human body can be considered a container since the body, as drug smugglers and savvy inmates know, is capable of holding or concealing various objects.

The Supreme Court’s broad definition of a container for Fourth Amendment purposes has created an interesting paradox. On the one hand, in keeping with the colloquial image of the container as a portable object used to carry personal items, the Court has explicitly refused to draw a distinction between worthy and unworthy containers, explaining that a traveler with a paper bag containing a toothbrush and a few articles of clothing has just as much a right to demand privacy from governmental intrusion as a business executive with a locked attaché case.³⁵ In other words, the Court’s official policy is to treat all containers alike.

amiss); Maclin, *supra* note 15, at 929 (arguing that Amar provides an incomplete account of the Fourth Amendment’s history); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994) (arguing that our understanding of the Fourth Amendment must change over time to accommodate circumstances that may not have been present at the time the Bill of Rights was drafted); Steinberg, *supra* note 15, at 229 (arguing that Amar’s position “receives little support from historical sources”); Thomas, *supra* note 15, at 1824–40 (critiquing Amar’s suggestion that the Reasonableness and Warrant Clauses should be read separately).

³¹ Arcila, *supra* note 30, at 1280 (arguing that the Framers included the Warrant Clause in the Fourth Amendment not to create a presumptive warrant requirement but “to strictly limit the grounds upon which warrants could issue”).

³² See, e.g., *United States v. Ross*, 456 U.S. 798 (1982) (paper bag); *Arkansas v. Sanders*, 442 U.S. 753 (1979) (suitcase); *United States v. Chadwick*, 433 U.S. 1 (1977) (footlocker).

³³ *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981).

³⁴ *Id.* at 462–63 (allowing warrantless search of zippered pocket of black leather jacket found on the back seat of vehicle).

³⁵ *Ross*, 456 U.S. at 822.

On the other hand, if we look closely at the Court's actual practice, we find that the Court is not as egalitarian in its treatment of containers as it proclaims to be. In deciding which containers deserve Fourth Amendment protection against governmental intrusion, the Court does not treat all containers alike.

Using the Court's broad definition of what constitutes a container, we can think of containers as lying along a spectrum of Fourth Amendment protection. Along this spectrum, houses are at the top because police usually need to obtain a warrant based on probable cause before they can enter and search a home.³⁶ Cars are at the bottom because police officers may search a car without a warrant as long as they have probable cause or reasonable grounds to believe there is contraband or evidence of a crime in the car.³⁷

The position of portable containers along this spectrum has fluctuated over the years.³⁸ Under the Container Doctrine, police with probable cause

³⁶ Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 913 (2010). Stern notes, "[t]he Supreme Court has defended the home as a sacred site at the 'core of the Fourth Amendment.'" *Id.* (quoting *Wilson v. Layne*, 526 U.S. 603, 612 (1999)).

³⁷ See Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 275 (1984) ("In its judging of categories rather than cases, the Supreme Court has treated automobiles as a class apart from homes, boxes and other things that may conceal incriminating evidence."). In other contexts, however, cars are treated similarly to houses. For example, in the self-defense context, many states have begun applying no duty to retreat rules, traditionally reserved for the home, to cars. FLA. STAT. § 776.013 (2009); LA. REV. STAT. ANN. § 14:20(A)(3) (2010).

³⁸ The position of bodies on this continuum also fluctuates. In many respects, bodies are treated with less respect than cars since warrantless searches of the body are routinely permitted. For example, a full search of the person incident to a lawful custodial arrest is allowed without a search warrant or showing of probable cause to believe the arrestee is concealing evidence of a crime on his person. *United States v. Robinson*, 414 U.S. 218, 235 (1973). Limited pat-down frisks of a person without a warrant are allowed if the officer has lawfully stopped the individual and has a reasonable suspicion that the person is armed and dangerous. *Terry v. Ohio*, 392 U.S. 1 (1968). Warrantless strip searches of international travelers are permitted if government agents have a reasonable suspicion that the person is smuggling drugs into the country. *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985). School officials may strip search a high school student without a warrant if they have a reasonable suspicion that the search is necessary to avert danger to other students or that the student is concealing evidence in her underwear. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009). Warrantless strip searches of pretrial detainees after contact visits are constitutional even if there is no individualized suspicion specific to the person being searched. *Bell v. Wolfish*, 441 U.S. 520, 558–60 (1979). Some lower courts have even permitted warrantless and suspicionless strip searches of pre-arraignment arrestees prior to their entering the general jail population. See, e.g., *Bull v. City and County of San Francisco*, 595 F.3d 964, 982 (9th Cir. 2010) (finding that San Francisco County Jail's blanket strip search policy, which permitted corrections officers to perform a visual inspection of the breasts, buttocks, and genitalia of all pre-arraignment arrestees prior to

to believe evidence of a crime or contraband is within a portable container may seize the container but may not open or search it without first obtaining a warrant or court order.³⁹ In requiring police to obtain a warrant prior to searching a portable container, the Container Doctrine expressed a clear preference for warrants, putting portable containers on almost equal footing with homes on the spectrum of Fourth Amendment protection.⁴⁰ Over the years, however, the Court has gradually eroded the Container Doctrine by permitting police officers in numerous situations to search containers without a warrant. When police are able to search a container without a warrant, portable containers are treated more like cars than houses. When police are allowed to search a container without either a warrant or probable cause, containers are given even less protection than cars.

A. *UNITED STATES V. CHADWICK*

The Supreme Court first announced the Container Doctrine in the 1977 case of *United States v. Chadwick*.⁴¹ In *Chadwick*, Amtrak railroad officials in San Diego, California watched as Gregory Machado and Bridget Leary loaded a brown footlocker onto an Amtrak train bound for Boston, Massachusetts.⁴² They thought the trunk seemed unusually heavy for its size and noticed that it was leaking talcum powder, a substance used by drug dealers to mask the smell of marijuana or hashish.⁴³ Amtrak officials reported their concerns to federal agents in San Diego who relayed this information along with a detailed description of the individuals and the footlocker to their counterparts in Boston.⁴⁴ When the train arrived in Boston several days later, federal narcotics agents were waiting with a

admission into the general jail population, was reasonable and not violative of the Fourth Amendment). *But see* *United States v. Barnes*, 506 F.3d 58, 62 (1st Cir. 2007) (requiring reasonable suspicion that an arrestee is concealing contraband on his person for a strip search of that arrestee). On the other hand, for an intrusion into the body, the Court has suggested that something more than a warrant based on probable cause is necessary. *See, e.g., Winston v. Lee*, 470 U.S. 753, 766 (1985) (holding that probable cause and warrant not sufficient to justify surgical removal of a bullet from a suspect's body); *see also* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1649–50 (1998) (discussing *Winston*).

³⁹ *United States v. Chadwick*, 433 U.S. 1, 15 (1977); *Arkansas v. Sanders*, 442 U.S. 753, 763–64 (1979).

⁴⁰ Alschuler, *supra* note 37, at 277 (1984) (“After *Chadwick*, the warrant requirement apparently applied to the search of big boxes called houses and small boxes called suitcases, but it ordinarily did not extend to the search of middle-sized boxes called automobiles.”).

⁴¹ *Chadwick*, 433 U.S. 1.

⁴² *Id.* at 3.

⁴³ *Id.*

⁴⁴ *Id.*

police dog trained to detect marijuana.⁴⁵ The agents, who had not procured an arrest or search warrant, spotted Machado and Leary and watched them as they claimed their suitcases and the footlocker from a baggage cart.⁴⁶ When Machado and Leary placed the footlocker on the floor and sat down on it, the agents released the dog near the footlocker.⁴⁷ The dog silently confirmed that the footlocker contained illegal drugs.⁴⁸

A little later, Joseph Chadwick joined Machado and Leary, and the three engaged the assistance of an attendant to move the footlocker, which was locked with a padlock and a regular trunk lock, to Chadwick's car.⁴⁹ Chadwick, Machado, and the attendant lifted the 200-pound footlocker into the trunk of Chadwick's car.⁵⁰ While the trunk of the car was still open and before the car was started, the narcotics agents arrested and then searched the three individuals. The agents found the keys to the locked footlocker on Machado.⁵¹ They then transported the three individuals and the footlocker and their luggage to the Federal Building.⁵² Approximately ninety minutes after the arrests, the agents opened the footlocker and found marijuana within.⁵³

Chadwick, Machado, and Leary were indicted for conspiracy and possession of marijuana with intent to distribute.⁵⁴ They moved to suppress the marijuana found in the footlocker.⁵⁵ The District Court found that the warrantless search of the footlocker violated the Fourth Amendment and ordered the marijuana excluded.⁵⁶ The Court of Appeals for the First Circuit affirmed,⁵⁷ and the Government appealed.

The United States Supreme Court affirmed, holding that the warrantless search of the locked footlocker violated the Fourth Amendment⁵⁸ even though the government agents had probable cause to believe the footlocker contained controlled substances, presumably from the

⁴⁵ *Id.*

⁴⁶ *Id.* at 3–4.

⁴⁷ *Id.* at 4.

⁴⁸ *Id.*

⁴⁹ *Id.* at 4–5.

⁵⁰ *Id.* at 4.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 4–5.

⁵⁴ *Id.* at 5.

⁵⁵ *Id.*

⁵⁶ *United States v. Chadwick*, 393 F. Supp. 763, 773 (D. Mass. 1975).

⁵⁷ *United States v. Chadwick*, 532 F.2d 773, 782 (1st Cir. 1976).

⁵⁸ *Chadwick*, 433 U.S. at 6.

observations of the Amtrak officials in San Diego⁵⁹ and the dog sniff of the footlocker.⁶⁰ The Court noted that by placing personal effects in a double-locked footlocker, the defendants had manifested an expectation that the contents of the footlocker would remain private.⁶¹ The Court suggested there was no problem with the agents seizing the footlocker since they had probable cause to believe there were illegal drugs within.⁶² However, once the footlocker was exclusively within the government's control, there was no danger that whatever was in the footlocker would be removed by the defendants.⁶³ Given the lack of any exigent circumstances supporting an immediate search, the Court held that government agents should have sought a warrant from a neutral magistrate before opening the footlocker.⁶⁴ The Court noted that the warrantless search could not be justified as a search incident to arrest because the search of the footlocker took place an hour-and-a-half after the arrest, and thus was not substantially contemporaneous with the arrest.⁶⁵

To understand the Container Doctrine, it is useful to examine the Government's arguments, which were considered but ultimately rejected by the Court. The Government started by referencing the historical debate over the meaning of the Fourth Amendment.⁶⁶ Invoking a strain of the Separate Clauses view of the Fourth Amendment, the Government contended that the Fourth Amendment's Warrant Clause protected only those interests traditionally identified with the home.⁶⁷ The Government noted that the Framers adopted the Warrant Clause primarily in response to unjustified intrusions into private homes on the authority of colonial writs of assistance or general warrants.⁶⁸ The Government further argued there was no evidence that the Framers intended "to modify the initial clause of

⁵⁹ *Id.* at 3 ("Their suspicions were aroused when they noticed that the trunk was unusually heavy for its size, and that it was leaking talcum powder, a substance often used to mask the odor of marihuana or hashish.").

⁶⁰ *Id.* at 4.

⁶¹ *Id.* at 11.

⁶² *Id.* at 13 ("The initial seizure and detention of the footlocker, the validity of which respondents do not contest, were sufficient to guard against any risk that evidence might be lost.").

⁶³ *Id.* at 4, 13.

⁶⁴ *Id.* at 15–16.

⁶⁵ *Id.* at 15.

⁶⁶ *Id.* at 6.

⁶⁷ *Id.* David Steinberg supports this reading of the Fourth Amendment. Steinberg, *supra* note 15, at 264–65 (arguing that the Framers intended to require warrants only for home entries).

⁶⁸ *Chadwick*, 433 U.S. at 6.

the Fourth Amendment by making warrantless searches supported by probable cause *per se* unreasonable.”⁶⁹

Chief Justice Burger acknowledged that “silence in the historical record tells us little about the Framers’ attitude toward the application of the Warrant Clause to the search of respondent’s footlocker.”⁷⁰ Nonetheless, the *Chadwick* Court ultimately rejected the Government’s argument, explaining, “We do not agree that the Warrant Clause protects only dwellings and other specifically designated locales.”⁷¹ Writing for the Court, Chief Justice Burger explained:

[I]f there is little evidence that the Framers intended the Warrant Clause to operate outside the home, there is no evidence at all that they intended to exclude from the protection of the Clause all searches occurring outside the home. The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America.⁷²

Expressing support for the Warrant Preference view, Chief Justice Burger noted the “strong historical connection between the Warrant Clause and the initial clause of the Fourth Amendment, which draws no distinction among ‘persons, houses, papers, and effects’ in safeguarding against unreasonable searches and seizures.”⁷³ Further linking the two clauses, Chief Justice Burger explained:

⁶⁹ *Id.* at 7.

⁷⁰ *Id.* at 8–9. While it is true that there is little in the historical record that tells us whether the Framers believed a warrant was necessary for a container search, there is some early common law support for the Container Doctrine. Almost one hundred years before the *Chadwick* decision, the Supreme Court drew a distinction between letters and sealed packages, on the one hand, and newspapers and pamphlets, on the other. *Ex parte Jackson*, 96 U.S. 727, 732 (1878). The Court in *Ex parte Jackson* held that postal inspectors could not without a warrant open letters and sealed packages to determine whether they contained articles that Congress had prohibited from being mailed, but could freely inspect newspapers, magazines, and pamphlets. *Id.* at 733. Presumably, the Court recognized the heightened expectations of privacy in sealed letters and packages and the warrant process as a means of protecting those expectations of privacy. On the other hand, there is also some indication that courts in the pre-*Chadwick* era gave less protection to containers in cars. Yale Kamisar notes that until 1977, when *Chadwick* was decided, “it was widely assumed that if the circumstances authorized a warrantless search of a vehicle under the *Carroll* Doctrine [the automobile exception], they also permitted a warrantless search of luggage or other containers found within the vehicle.” Yale Kamisar, *The “Automobile Search” Cases: The Court Does Little to Clarify the “Labyrinth” of Judicial Uncertainty*, in *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1980–1981: AN EDITED TRANSCRIPT OF THE THIRD ANNUAL SUPREME COURT REVIEW AND CONSTITUTIONAL LAW SYMPOSIUM* 82 (Dorothy Opperman ed., 1982).

⁷¹ *Chadwick*, 433 U.S. at 7.

⁷² *Id.* at 8–9.

⁷³ *Id.*

Our fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances. The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer “engaged in the often competitive enterprise of ferreting out crime.”⁷⁴

The *Chadwick* Court concluded that by placing personal effects into a double-locked footlocker, the defendants manifested an expectation that its contents would remain free from public examination.⁷⁵ The Court noted, “No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment’s Warrant Clause.”⁷⁶ In essence, the Court put portable containers on an equal footing with private homes.

The Government also argued that luggage is analogous to motor vehicles in that both are readily mobile.⁷⁷ Since the Court allows police to engage in warrantless searches of automobiles whenever they have probable cause to believe there is evidence of a crime within the vehicle, the Government argued that the Court should similarly allow warrantless searches of luggage as long as police have probable cause to believe evidence of a crime is within the luggage.⁷⁸ The *Chadwick* Court rejected this argument as well, noting that “[t]he factors which diminish the privacy aspects of an automobile do not apply to respondent’s footlocker.”⁷⁹ The Court explained that one has a lessened expectation of privacy in a motor vehicle because its primary function is transportation, not serving as the repository for one’s personal effects.⁸⁰ Moreover, a motor vehicle is subject to pervasive regulation and travels on public thoroughfares where both its occupants and contents are in plain view.⁸¹ In contrast, the contents of luggage are not open to public view, and luggage is not subject to regular inspections.⁸²

⁷⁴ *Id.* at 9.

⁷⁵ *Id.* at 11.

⁷⁶ *Id.*

⁷⁷ *Id.* at 11–12.

⁷⁸ *Id.* at 12–13.

⁷⁹ *Id.* at 13.

⁸⁰ *Id.* at 12.

⁸¹ *Id.*

⁸² *Id.* at 12–13.

B. *ARKANSAS V. SANDERS*

In *Arkansas v. Sanders*, the Court extended *Chadwick* to a case involving an unlocked suitcase in the trunk of a taxicab.⁸³ In light of the fact that the footlocker in *Chadwick* was seized just after it was placed in the trunk of Chadwick's car whereas the suitcase in *Sanders* was placed in the trunk of the taxicab and then driven several blocks before it was seized, the container in *Sanders* had a greater nexus to the vehicle than the container in *Chadwick*. *Sanders* thus offered the Court the opportunity to clarify whether the automobile exception permitted the warrantless search of a container in a running motor vehicle.⁸⁴ It also gave the Court the opportunity to draw a distinction between locked and unlocked containers, if it so desired.

The police in *Sanders* received a tip from an informant who had given reliable information to the police in the past. The informant told police that Sanders would be flying into Little Rock, Arkansas on a particular American Airlines flight, carrying a green suitcase that contained marijuana.⁸⁵ Police set up surveillance at the airport, and watched as Sanders retrieved a green suitcase from the baggage claim area.⁸⁶ Sanders gave the suitcase to another man who placed it into the trunk of a waiting taxicab.⁸⁷ When the taxi drove away, the officers followed it for a few blocks before stopping it.⁸⁸ The taxi driver opened the trunk for the officers.⁸⁹ Without asking Sanders for permission, the officers opened the unlocked suitcase that was in the trunk and found 9.3 pounds of marijuana within.⁹⁰

This time, the Government argued that the warrantless search of the suitcase was valid under the automobile exception to the warrant requirement, which allows law enforcement officers to conduct warrantless

⁸³ *Arkansas v. Sanders*, 442 U.S. 753 (1979), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991).

⁸⁴ In *Chadwick*, government officials seized the padlocked footlocker just after the defendant placed it in the trunk of his car. 433 U.S. at 4. In *Sanders*, the police followed the taxicab which contained the suitcase at issue for several blocks before stopping the taxi and searching the suitcase. 442 U.S. at 755. Writing for the Court in *Arkansas v. Sanders*, Justice Powell explained, "We took this case by writ of certiorari to the Supreme Court of Arkansas to resolve some apparent misunderstanding as to the application of our decision in *United States v. Chadwick* . . . to warrantless searches of luggage seized from automobiles." *Id.* at 754.

⁸⁵ *Id.* at 755.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

searches of motor vehicles when they have probable cause to believe there is evidence of a crime within the vehicle.⁹¹ According to the Government, because the officers had probable cause to believe there was marijuana in the suitcase that was in a motor vehicle, the officers had the right to search the suitcase without a warrant.⁹²

Reflecting its support for the Warrant Preference view, the *Sanders* Court rejected the Government's argument. The Court reiterated that "[a] lawful search of luggage generally may be performed only pursuant to a warrant."⁹³ Echoing *Chadwick*, the *Sanders* Court declined to extend the automobile exception to searches of luggage in automobiles for two reasons. First, because the officers had seized the luggage and had it exclusively under their control, there was "not the slightest danger that [the luggage] or its contents could have been removed before a valid search warrant could be obtained."⁹⁴ The fact that the luggage was found in a taxicab, a motor vehicle, did not change the fact that the police had seized the luggage and had it securely within their control.⁹⁵ Second, the Court emphasized the heightened expectations of privacy associated with luggage, noting that "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy."⁹⁶ The *Sanders* Court noted that a suitcase taken from an automobile "is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations."⁹⁷ The Court explained:

One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored. Indeed, the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them.⁹⁸

Writing for the *Sanders* Court, Justice Powell suggested in a footnote that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment."⁹⁹ He explained, "[S]ome containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward

⁹¹ *Id.* at 761. For an extended discussion of the automobile exception, see *infra* text accompanying notes 180–224.

⁹² *Sanders*, 442 U.S. at 761.

⁹³ *Id.* at 762.

⁹⁴ *Id.*

⁹⁵ *Id.* at 763.

⁹⁶ *Id.* at 762.

⁹⁷ *Id.* at 764.

⁹⁸ *Id.*

⁹⁹ *Id.* at 764 n.13.

appearance.”¹⁰⁰ Justice Powell further opined that a warrant would not be necessary where the contents of a package are open to plain view.¹⁰¹

Footnote 13 in *Sanders* led some lower courts to draw a distinction between “worthy” and “unworthy” containers, or containers protected by the Fourth Amendment and containers not so protected,¹⁰² a distinction that a plurality of the Court rejected in 1981. In *Robbins v. California*, in opposing a motion to suppress fifteen pounds of marijuana found in packages wrapped in green opaque plastic in a recessed luggage compartment of a car, the State of California argued that “the Fourth Amendment protects only containers commonly used to transport ‘personal effects.’”¹⁰³ It urged the Court to draw “a distinction between pieces of sturdy luggage, like suitcases, and flimsier containers, like cardboard boxes.”¹⁰⁴ A plurality of the Court rejected the State’s attempt to draw a distinction between worthy and unworthy containers, explaining that it would be “difficult if not impossible” to come up with objective criteria to draw such a distinction.¹⁰⁵ The Court noted, “What one person may put into a suitcase, another may put into a paper bag.”¹⁰⁶ In response to the State’s objection that footnote 13 in *Arkansas v. Sanders* supported a distinction between worthy and unworthy containers, Justice Stewart explained that footnote 13 simply meant that if a container’s contents were apparent, then under the plain view doctrine, it would not be protected by the Fourth Amendment.¹⁰⁷

Concurring in the *Robbins* opinion, Justice Powell disagreed with the plurality’s interpretation of footnote 13 in *Sanders*, which he had authored.¹⁰⁸ He suggested what Albert Alschuler has called a tripartite rule for container searches.¹⁰⁹ Under Justice Powell’s proposed rule, police

¹⁰⁰ *Id.* at 764–65 n.13.

¹⁰¹ *Id.*

¹⁰² Alschuler, *supra* note 37, at 278 (noting that Justice Powell’s statement in footnote 13 “led some lower courts to distinguish ‘worthy containers’ whose search ordinarily would require advance judicial approval, from ‘unworthy containers,’ which police officers could search without warrants and without probable cause”); Robert A. Wainger, *The Warrant Requirement for Container Searches and the “Well-Delineated” Exceptions: The New “Bright Line” Rules*, 36 U. MIAMI L. REV. 115, 120 (1981) (“After *Sanders* the federal courts of appeals frequently distinguished containers that were analogous to luggage from those that were not Containers of a less substantial nature than luggage consequently were subject to warrantless searches.”).

¹⁰³ 453 U.S. 420, 425 (1981).

¹⁰⁴ *Id.* at 425–26.

¹⁰⁵ *Id.* at 426.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 427.

¹⁰⁸ *Id.* at 429 (Powell, J., concurring).

¹⁰⁹ Alschuler, *supra* note 37, at 278.

would always need a warrant prior to searching a container “inevitably associated with the expectation of privacy,” such as personal luggage.¹¹⁰ Police would never need a warrant to search containers that “consistently lack such an association,” such as plastic cups and brown paper grocery bags.¹¹¹ For containers that may be used as repositories of personal effects but often are not, such as cardboard boxes and laundry bags, courts would decide on a case-by-case basis whether the defendant manifested a reasonable expectation of privacy in the container.¹¹²

Relevant to such an inquiry should be the size, shape, material, and condition of the exterior, the context within which it is discovered, and whether the possessor had taken some significant precaution, such as locking, securely sealing or binding the container, that indicates a desire to prevent the contents from being displayed upon simply mischance.¹¹³

The next year, a majority of the Court laid to rest the idea that a distinction should be drawn between “worthy” and “unworthy” containers. In *United States v. Ross*, the Court noted that even though such a distinction “could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction.”¹¹⁴

There are many reasons to support increased Fourth Amendment protection for certain containers. Some containers are so obviously repositories for highly personal effects that most people would agree they should be accorded strong Fourth Amendment protection. For example, there is near universal consensus that the home is a place where privacy expectations are strongest.¹¹⁵ This is in part because the “home is a place where intimate things are kept from prying eyes and intimate relationships are carried on away from prying ears.”¹¹⁶ Many would regard wallets and

¹¹⁰ *Robbins*, 453 U.S. at 434 n.3 (Powell, J., concurring) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979)).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *United States v. Ross*, 456 U.S. 798, 822 (1982).

¹¹⁵ See, e.g., *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (noting that the Fourth Amendment draws “a firm line at the entrance to the house”) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)); *Payton*, 445 U.S. at 603 (requiring a warrant for an in-home arrest); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that the State may not prosecute an individual for possessing obscene materials in the privacy of his or her own home). Some individuals’ homes, however, are provided less Fourth Amendment protection than others. See *infra* text accompanying notes 391–430 (discussing lower court opinions holding that a homeless person lacks a reasonable expectation of privacy in his home on public property).

¹¹⁶ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 997 (1982).

purses with equal regard since they too are repositories for highly personal effects, the contents of which we would not ordinarily share with total strangers or even close friends. Margaret Radin makes a convincing case for treating cars like homes insofar as meriting Fourth Amendment protection against governmental intrusion without a warrant.¹¹⁷ Through the automobile exception, the Court has “in essence declared that cars are generally not considered private.”¹¹⁸ Radin notes, however, that “[c]ars are the repository of personal effects, and cars form the backdrop for carrying on private thoughts or intimate relationships, just as homes do.”¹¹⁹ Most people would not be happy if the government could, without any justification or prior court approval, place a listening device in our cars and listen in on all of our car conversations.¹²⁰

On the other hand, most of us would agree that the police should be allowed to take steps to determine whether an apparently abandoned or forgotten backpack, suitcase, or package left unattended on a public sidewalk or in an area frequented by many people, such as a metro station or airport, contains explosive material. Law enforcement authorities, however, can often determine whether a package contains explosive material without opening it. For example, they can use a bomb-sniffing dog to determine whether a piece of luggage contains explosives. Even when it established the Container Doctrine, the Court recognized that exigent circumstances would permit the warrantless search of a container.¹²¹

On balance, I think the Court is correct in refusing to draw a distinction between worthy and unworthy containers. A poor person who cannot afford a home or a car may keep his most prized possessions in plastic garbage bags that others might use for their trash. If the Court protects the wealthy person’s home and the containers within it from governmental intrusion absent probable cause and a warrant, it ought to protect the poor person’s garbage bags.

With *Chadwick* and *Sanders*, the Court thus established the Container Doctrine—the rule that if police have probable cause to believe contraband or evidence of a crime is in a locked or unlocked container, they may seize

¹¹⁷ *Id.* at 1001.

¹¹⁸ *Id.* at 1000.

¹¹⁹ *Id.* at 1001.

¹²⁰ Indeed, most of us would probably not like it if the government were to place a tracking device on our cars and follow our every driving movement. The Court’s jurisprudence allows the government to do just this as long as the car stays on the public roads. *See United States v. Karo*, 468 U.S. 705 (1984). Since the government does not place tracking devices on most of our cars, the vast majority of us either do not realize that this is something the government can do or care enough to complain about it.

¹²¹ *United States v. Chadwick*, 433 U.S. 1, 15 (1977).

that container without a warrant or consent, but cannot open it unless and until they have obtained a warrant issued by a neutral judicial officer who agrees with their assessment of probable cause, even if that container happens to be in a motor vehicle.¹²² Two justifications support the Container Doctrine. First, containers are repositories for personal effects and therefore enjoy heightened expectations of privacy.¹²³ Second, once an officer has seized a container and has it under his exclusive possession and control, there is little or no danger that the owner of the container will gain access to or destroy any evidence within the container.

¹²² As discussed below in Part IV.B., the Court later overruled *Sanders* while leaving *Chadwick* on the books. *California v. Acevedo*, 500 U.S. 565, 580 (1991).

¹²³ As recently as 2000, the Court reinforced the notion that containers enjoy heightened expectations of privacy. In *Bond v. United States*, the Court held that an officer's exploratory squeezing of a bus passenger's duffel bag violated the passenger's reasonable expectations of privacy and therefore constituted a "search" within the meaning of the Fourth Amendment. 529 U.S. 334, 335 (2000). The Court started by noting, "[I]t is undisputed here that petitioner possessed a privacy interest in his bag." *Id.* at 337. It then found Bond's expectation of privacy reasonable, explaining that "travelers are particularly concerned about their carry-on luggage; they generally use it to transport personal items that, for whatever reason, they prefer to keep close at hand." *Id.* at 337–38. The Court viewed the officer's action of squeezing Bond's bag for the purpose of determining whether it was concealing contraband as extremely invasive, analogizing the officer's action to a *Terry* frisk of the person: "Although Agent Cantu did not 'frisk' petitioner's person, he did conduct a probing tactile examination of petitioner's carry-on luggage." *Id.* at 337; *see also* *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968). Notably, the Court rejected the Government's argument that the officer's action did not constitute a search because the officer was just doing what any bus passenger could have done. As anyone who has flown recently knows, it is quite common for airline passengers seeking overhead bin space to move other passengers' bags. In other contexts, the Court has held that police action does not constitute a search if the police officer is merely doing something any member of the public can do. *See, e.g., Florida v. Riley*, 488 U.S. 445, 451 (1989) ("Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse."); *California v. Greenwood*, 486 U.S. 35, 40 (1988) ("It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public."); *United States v. Knotts* 460 U.S. 276, 281–82 (1983) (holding that use of a beeper to track a car's movements on the public roads was not a search because any member of the public could have observed the defendant's travels over public roads). The Court concluded that "the agent's physical manipulation of petitioner's bag violated the Fourth Amendment." *Bond*, 529 U.S. at 339; *see also* David Rudstein, "Touchy" "Feely"—Is There a Constitutional Difference? *The Constitutionality of "Prepping" a Passenger's Luggage for a Human or Canine Sniff After Bond v. United States*, 70 U. CIN. L. REV. 191, 214 (2001) (arguing that "*Bond* should be interpreted broadly to encompass the physical manipulation by a law enforcement officer of soft-sided luggage checked with the carrier by a passenger").

IV. THE DISAPPEARING CONTAINER DOCTRINE

Over the past several decades, the Court has substantially undermined the Container Doctrine, permitting police to search containers without a search warrant, and sometimes even without probable cause. Without formally overruling *Chadwick*'s rule that a container search ordinarily requires a warrant, the Court has authorized many warrantless container searches under various exceptions to the warrant requirement.

In this Part, I discuss the numerous ways in which the police may engage in warrantless searches of containers notwithstanding the Container Doctrine. I show how the steady erosion of the Container Doctrine loosely corresponds with the Court's movement away from the Warrant Preference view of the Fourth Amendment and its gradual embrace of the Separate Clauses view. Just as the Court has waffled in its broader Fourth Amendment jurisprudence between a preference for warrants and the view that the Fourth Amendment requires only reasonableness, it has gone back and forth between these two views when deciding whether and when police may conduct warrantless searches of containers. Although not explicit in any of its opinions, the Court's ambivalence may reflect its skepticism regarding the effectiveness of warrants and a deeper recognition that warrants may not be as protective of privacy in practice as they are in theory.¹²⁴

Starting with the search incident to arrest exception, this Part examines the various exceptions to the warrant requirement that enable police officers to search containers without a warrant. The requirements needed to satisfy each exception are different, which is why it is best to think of these exceptions as distinct ways that police can search our containers without a warrant. It is important to recognize that the exceptions often overlap, causing conceptual confusion.¹²⁵ More than one exception may justify the same search. This is particularly true in car search cases, which can be validated under the search incident to arrest exception, the automobile exception, the consent doctrine, and the inventory search exception.

A. SEARCHES OF CONTAINERS INCIDENT TO ARREST

One way police officers can search a container without a warrant is through the search incident to arrest exception. The Court has long recognized that incident to a lawful custodial arrest, law enforcement agents

¹²⁴ See Part II.A. for a discussion of problems with the warrant process.

¹²⁵ *Kamisar*, *supra* note 70, at 73 (“[A]lthough conceptually distinct, in a typical case the *Carroll* Doctrine and the “search incident” exception to the Warrant Clause do overlap—the same probable cause that points to the likely presence of evidence in the vehicle points also to the likely guilt of the driver.”).

may search the person of the arrestee and his wingspan, the area from which the arrestee might grab a weapon or destroy evidence.¹²⁶ The two main justifications for allowing officers to perform warrantless searches incident to arrest are: (1) officer safety, and (2) preservation of evidence.¹²⁷ Warrantless searches incident to arrest occur more often than searches with a warrant.¹²⁸

There are only two requirements for a valid search incident to arrest. First, there must be a lawful, custodial arrest, and second, the search must be substantially contemporaneous with the arrest.¹²⁹ No further justification beyond the probable cause needed to arrest is necessary.¹³⁰ The officer

¹²⁶ *Chimel v. California*, 395 U.S. 752, 755–68 (1969) (discussing prior search incident to arrest cases). For an overview of the origins and evolution of the search incident to arrest exception, see Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 385–90 (2001); see also Craig M. Bradley, *The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429 (1993) (critiquing *Robinson*, *Belton*, and *Acevedo*); Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27 (2008) (arguing that given the vast amount of information contained within iPhones, iPhones should be given greater protection than ordinary containers under the search incident to arrest doctrine); Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657 (critiquing *Chimel* and *Belton*).

¹²⁷ *Chimel*, 395 U.S. at 763.

¹²⁸ 3 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.2(b) (4th ed. 2004) (“While the myth persists that warrantless searches are the exception, the fact is that searches incident to arrest occur with the greatest frequency.”); Craig M. Bradley, *The “Good Faith Exception” Cases: Reasonable Exercise in Futility*, 60 IND. L.J. 287, 290 (1985) (noting that it is “well-known that far more evidence is obtained” through warrantless searches, including searches incident to arrest, than with warrants); Robert C. Fellmeth, *The Optimum Remedy for Constitutional Breaches: Multiaccessed Civil Penalties in Equity*, 26 PEPP. L. REV. 923, 946 (1999) (“Search warrants are only involved in a small percentage of criminal arrests. Most searches subject to suppression dispute are those incident to arrest.”); Logan, *supra* note 126, at 382 (“[B]y far the commonest method of searching is incident to an arrest.”).

¹²⁹ *United States v. Robinson*, 414 U.S. 218, 235 (1973) (“It is the fact of the lawful arrest that establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.”); *Vale v. Louisiana*, 399 U.S. 30, 33–34 (1970) (“A search may be incident to arrest ‘only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.’”) (quoting *Shipley v. California*, 395 U.S. 818, 819 (1968)).

¹³⁰ The Court has substantially loosened the triggering requirements for a valid search incident to arrest. For example, in *Virginia v. Moore*, the Court upheld a warrantless search under the search incident to arrest exception even though the arrest was not lawful under existing state law, suggesting that as long as the arrest is “constitutionally permissible,” it is valid for search incident to arrest purposes. 553 U.S. 164, 176 (2007) (“We have recognized, however, that officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence.”). The Court has

need not have probable cause to believe there is evidence of a crime on the person of the arrestee or within the arrestee's wingspan in order to search the arrestee or his wingspan.¹³¹

The rule that incident to a lawful custodial arrest, an officer may conduct a full search of the person was established in *United States v. Robinson*.¹³² In *Robinson*, the Court held that incident to arrest, a police officer may conduct a full search of the arrestee, including any containers found on his person, even if the officer does not actually fear for his personal safety or believe that the arrestee will destroy evidence.¹³³ Robinson was stopped by an officer who, as a result of an investigation into Robinson's operator's permit a few days earlier, had probable cause to believe Robinson was operating a motor vehicle after revocation of his permit.¹³⁴ After pulling over Robinson, the officer placed him under arrest and proceeded to search Robinson face-to-face.¹³⁵ While patting him down, the officer felt an object in the left breast pocket of Robinson's heavy coat.¹³⁶ The officer reached into Robinson's pocket, pulled out a crumpled up cigarette package, and opened it, finding fourteen gelatin capsules of white powder which he suspected was (and which turned out to be) heroin.¹³⁷ The Court upheld the officer's actions, holding that incident to a lawful custodial arrest, a police officer may conduct a full search of the arrestee's person.¹³⁸ The *Robinson* Court made clear that even though the search incident to arrest exception is grounded in officer safety and preservation of evidence rationales, the Government need not prove that the officer actually feared for his safety or believed the arrestee was about to destroy evidence in his possession.¹³⁹

In his dissent, Justice Marshall noted that in focusing on the right of the officer to search the person of the arrestee incident to arrest, the

also upheld warrantless searches as searches incident to arrest even when the search was not substantially contemporaneous with the arrest. *See, e.g., id.* at 167 n.1 (noting arresting officers did not perform search incident to arrest immediately upon taking Moore into custody because each officer mistakenly believed the other had already done so); *United States v. Edwards*, 415 U.S. 800 (1974) (upholding search of suspect's clothing ten hours after arrest as a search incident to arrest).

¹³¹ *See* WAYNE R. LAFAYE, *CRIMINAL PROCEDURE*, § 3.5 (b) (5th ed. 2009) ("It is the fact of the lawful arrest which establishes the authority to search . . .").

¹³² 414 U.S. at 236.

¹³³ *Id.*

¹³⁴ *Id.* at 220–21.

¹³⁵ *Id.* at 221–22.

¹³⁶ *Id.* at 223.

¹³⁷ *Id.*

¹³⁸ *Id.* at 235.

¹³⁹ *Id.* at 236.

majority ignored the fact that the search in question also involved the search of a container.¹⁴⁰ Rooting his dissent in one of the original rationales behind the Container Doctrine, Justice Marshall pointed out that it would not have been impracticable or dangerous for the officer to have obtained a warrant prior to searching the cigarette package.¹⁴¹ Once the officer had the crumpled up cigarette package in his hands, it would have been virtually impossible for Robinson to gain access to anything within the package.¹⁴²

Highlighting the possibility of unconscious class bias underlying the decision, Justice Marshall opined that the case may have been resolved differently had the defendant been a businessman or a lawyer and the container a wallet or a sealed envelope:

One wonders if the result in this case would have been the same were respondent a businessman who was lawfully taken into custody for driving without a license and whose wallet was taken from him by the police. Would it be reasonable for the police officer, because of the possibility that a razor blade was hidden somewhere within the wallet, to open it, remove all the contents, and examine each item carefully? Or suppose a lawyer lawfully arrested for a traffic offense is found to have a sealed envelope on his person. Would it be permissible for the arresting officer to tear open the envelope in order to make sure that it did not contain a clandestine weapon—perhaps a pin or a razor blade? Would it not be more consonant with the purpose of the Fourth Amendment and the legitimate needs of the police to require the officer, if he has any question whatsoever about what the wallet or letter contains, to hold on to it until the arrestee is brought to the precinct station?¹⁴³

Robinson was decided in 1973, four years before *Chadwick* and six years before *Sanders*. In the 1970s, most of the Court's opinions reflected the Warrant Preference view of the Fourth Amendment.¹⁴⁴ Even Justice Rehnquist, a later proponent of the Separate Clauses view,¹⁴⁵ acknowledged

¹⁴⁰ *Id.* at 255 (Marshall, J., dissenting) ("The majority opinion fails to recognize that the search conducted by Officer Jenks did not merely involve a search of respondent's person. It also included a separate search of the effects found on his person."); see also Bradley, *supra* note 126, at 434 (noting the possibility that the *Robinson* Court "simply did not consider the cigarette package a sufficiently important repository of personal effects" to require a warrant).

¹⁴¹ *Robinson*, 414 U.S. at 256 (Marshall, J., dissenting).

¹⁴² *Id.* During oral argument, the Government had suggested that it would be administratively inconvenient to require a police officer, after removing a container from an arrestee's person, to hold onto the container rather than look inside and determine what it contained. *Id.* at 259 n.7. Justice Marshall responded to this argument by admonishing that "[m]ere administrative inconvenience . . . cannot justify invasion of Fourth Amendment rights." *Id.*

¹⁴³ *Id.* at 257–58 (Marshall, J., dissenting).

¹⁴⁴ See Maclin, *supra* note 16, at 204 (noting that "[t]he warrant preference view grew in stature during the latter half of the 1960's and the early 1970's").

¹⁴⁵ See, e.g., *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness."); *Robbins v. California*, 453 U.S. 420, 438 (1981)

the existence of a warrant requirement when writing the majority opinion in *Robinson*. Justice Rehnquist started his analysis by noting, “It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment.”¹⁴⁶ However, hints that Justice Rehnquist would later see the Fourth Amendment as requiring nothing more than reasonableness are also evident in the opinion. In announcing the holding, Justice Rehnquist wrote, “[W]e hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.”¹⁴⁷

In 1981, the Court extended the scope of a search incident to arrest to include the passenger compartment of the car and any containers within when the arrestee is an occupant or recent occupant of the vehicle.¹⁴⁸ *New York v. Belton* involved the search of a leather jacket found in the backseat of a car stopped for speeding.¹⁴⁹ When the officer walked up to the car, he smelled marijuana and saw an envelope marked “Supergold” on the floor of the car, which prompted him to arrest the four men in the car.¹⁵⁰ After searching each of the four men, the officer searched the passenger compartment of the car where he found a black leather jacket belonging to

(Rehnquist, J., dissenting) (“It is often forgotten that nothing in the Fourth Amendment requires that searches be conducted pursuant to warrants.”); *see also* Thomas Y. Davies, *Denying a Right By Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 6 (1991) (noting that instead of understanding Fourth Amendment reasonableness as substantively satisfied by probable cause and warrants, “[t]he Rehnquist Court . . . tends to read the reasonableness requirement in such a loose and formless way that enforcement of the right announced in the Fourth Amendment is greatly diminished”); Maclin, *supra* note 16, at 205 (“After he was appointed to the Court, then Justice Rehnquist followed Justice White’s lead by arguing that the Fourth Amendment only required that police intrusions be reasonable.”).

¹⁴⁶ *Robinson*, 414 U.S. at 224 (emphasis added).

¹⁴⁷ *Id.* at 235.

¹⁴⁸ *New York v. Belton*, 453 U.S. 454, 460 (1981). *Belton* was substantially undermined in 2009 when the Court decided *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (holding that incident to the lawful arrest of the occupant of a car, an officer may search the passenger compartment of the car if: (1) the passenger compartment is within the arrestee’s reaching distance at the time of the search, or (2) the officer has reason to believe there is evidence regarding the crime of arrest in the car). Justice Stevens, who wrote the majority opinion in *Gant*, claimed the Court was not overruling *Belton*, but it is clear that the government can no longer argue that anytime an occupant of a vehicle is lawfully arrested, the officer can search the passenger compartment of the car regardless of whether it is within the arrestee’s wingspan.

¹⁴⁹ 453 U.S. at 455–56.

¹⁵⁰ *Id.*

Belton.¹⁵¹ The officer unzipped one of the pockets and found cocaine within.¹⁵²

In analyzing whether the search of Belton's leather jacket violated the Fourth Amendment, the Court started by endorsing the Warrant Preference view of the Fourth Amendment:

It is a first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so. This Court has recognized, however, that "the exigencies of the situation" may sometimes make exemption from the warrant requirement "imperative."¹⁵³

The Court then opined that the search of Belton's jacket fell within the search incident to arrest exception to the warrant requirement, reasoning that when the occupant of a vehicle is arrested, the passenger compartment is generally within the arrestee's grabbing distance or wingspan.¹⁵⁴

Unlike the *Robinson* Court, which ignored the fact that the case involved a container search, the *Belton* Court explicitly acknowledged that it was dealing with a warrantless search of a container: "It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach."¹⁵⁵ The Court even provided a definition for the term "container": "'Container' here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like."¹⁵⁶

¹⁵¹ *Id.* at 456.

¹⁵² *Id.* at 456.

¹⁵³ *Id.* at 457 (quoting *McDonald v. United States*, 333 U.S. 451, 456 (1948)).

¹⁵⁴ *Id.* at 460 ("Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" (quoting *Chimel v. California*, 395 U.S. 752 (1969))).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 460 n.4. While the *Belton* Court was careful to define what it meant by the word "container," it did not explicitly address whether an officer could search a locked container found within the passenger compartment incident to an arrest. Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535, 551 (2002) (noting that the question of whether a lawful warrantless search of the passenger compartment incident to arrest includes locked containers remains open). Most lower courts confronted with this question have held that an officer may search a locked container in the passenger compartment of a car incident to the arrest of an occupant of the car, interpreting the language in *Belton* that referred to closed or open receptacles within the passenger compartment as broadly allowing a search of any container, locked or unlocked, found in the

Despite the officer safety and preservation of evidence rationales behind the search incident to arrest exception, the *Belton* Court, like the *Robinson* Court, seemed unconcerned with whether there was actually any danger that Belton or his companions could have gained access to a weapon or evidence in the zippered pocket of Belton's leather jacket.¹⁵⁷ The Court explained that the need for clear, bright-line rules to guide police officers in the field justified dispensing with a case-by-case consideration of whether these justifications were actually present in cases involving searches of the passenger compartment of a vehicle incident to arrest.¹⁵⁸

In 2009, the Court reversed course, holding in *Arizona v. Gant* that police officers may not search the passenger compartment of a motor vehicle incident to a recent occupant's arrest unless the arrestee is actually within reaching distance of the passenger compartment at the time of the search or there is reason to believe the vehicle contains evidence of the offense of arrest.¹⁵⁹ Requiring the arrestee to be within reaching distance of the passenger compartment at the time of the search reflects a return to the original justifications behind the search incident to arrest doctrine—justifications grounded in officer safety and evidence preservation concerns. Allowing the officer to search the passenger compartment if he has reason to believe it contains evidence related to the crime of arrest was a concession to Justice Scalia who had proposed such a rule in his concurrence in *Thornton v. United States*, an earlier case which held that the

car's interior. See, e.g., *United States v. Nichols*, 512 F.3d 789, 797 (6th Cir. 2008); *United States v. Howe*, 313 F. Supp. 2d 1178, 1184–85 (D. Utah 2003) (“The Court finds the search of the locked briefcase analogous to the search of a locked glove compartment, which several circuits have found permissible.”); *State v. Fry*, 388 N.W.2d 565, 576 (Wis. 1986) (“We conclude that all closed containers, locked or unlocked, in an automobile which may be searched incident to an arrest can be searched.”). A few courts, in contrast, have held that an officer may not search a locked container found in the passenger compartment of a car incident to arrest, noting that the contents of a locked container generally are not readily accessible to the arrestee and that by locking the container, the arrestee has manifested a heightened expectation of privacy. See, e.g., *State v. Jones*, 45 P.3d 1062, 1066 (Wash. 2002) (“[L]ocked containers within a vehicle may not be searched incident to an occupant's arrest.”); *State v. Stroud*, 720 P.2d 436, 441 (Wash. 1986) (holding that the Washington state constitution requires an officer conducting a search incident to arrest to obtain a warrant before unlocking and searching a locked container found in the passenger compartment of a car).

¹⁵⁷ 453 U.S. at 458.

¹⁵⁸ *Id.* For a critique of the Court's embrace of bright-line rules, see Alschuler, *supra* note 37; Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 393–95 (2004) (arguing that the desire for determinacy has led the Court to embrace bright-line rules that have the unintended consequence of undermining the legitimacy of police search power).

¹⁵⁹ *Arizona v. Gant*, 129 S. Ct. 1710 (2009).

rule of *Belton* applies even when the officer initiates contact with the arrestee after the arrestee has exited the vehicle.¹⁶⁰

Focusing on reasonableness, the State argued that searches incident to arrest of the passenger compartment of a motor vehicle are reasonable even in cases where the arrestee is not actually able to access the passenger compartment because law enforcement interests, particularly the interest in bright-line rules, outweigh the arrestee's limited privacy interest in his vehicle.¹⁶¹ The Court rejected this argument, accusing the State of "seriously undervalu[ing] the privacy interests at stake."¹⁶² The Court

¹⁶⁰ *Thornton v. United States*, 541 U.S. 615 (2004). In *Thornton*, Justice Scalia proposed a rule that would enable an officer to engage in a search incident to arrest of the vehicle whenever he has reason to believe evidence relevant to the crime of arrest might be found in the car. *Id.* at 632 (Scalia, J., concurring). The majority opinion in *Arizona v. Gant* thus reflects a marriage of convenience. Three of the Justices (Stevens, Souter, and Ginsburg) probably would have been happy with a rule limiting *Belton* searches to cases where the arrestee is within reaching distance of the passenger compartment at the time of the search, but in order to get Justices Scalia and Thomas on board, they adopted Justice Scalia's proposal allowing an officer to search the passenger compartment incident to arrest when the officer has reason to believe there is evidence relating to the crime of arrest in the vehicle.

By incorporating Justice Scalia's proposal, the Court may have unwittingly opened the door to future erosion of motorists' privacy interests. While prong one of the new *Gant* test (allowing warrantless searches of the passenger compartment if the arrestee is actually within reaching distance of the passenger compartment at the time of the search) arguably makes it more difficult for officers to search vehicles incident to arrest, prong two (allowing a warrantless search of the passenger compartment if the officer has reason to believe the vehicle contains evidence of the crime of arrest) arguably makes it easier because it allows an officer to search the passenger compartment of the vehicle practically any time the occupant is arrested for a crime other than a traffic violation. James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1470 (arguing that "[a]n endorsement of [Justice Scalia's] evidence-gathering theory for searches incident to arrest would likely expand officers' authority to conduct searches incident to arrest whenever an offense is of a sort that 'might' entail evidence or contraband"). Moreover, if an officer has reason to believe there is evidence of the crime of arrest somewhere in the vehicle, there is no principled reason to restrict the search to the passenger compartment. The reason *Belton* restricted the search incident to arrest to the passenger compartment was because the Court felt the passenger compartment was generally within the recent occupant's grabbing distance. A closed trunk, in contrast, is not. If the reason for allowing the search is because the officer has reason to believe evidence of a crime is in the vehicle, it does not make sense to restrict the search to the passenger compartment. *Gant*, 129 S. Ct. at 1731 (Alito, J., dissenting). In his dissent, Justice Alito noted that it was unclear why the court used the standard "reason to believe" rather than probable cause, suggesting that "reason to believe" is a lower standard than probable cause. *Id.* (Alito, J., dissenting). This interpretation makes sense because if an officer has probable cause to believe evidence of a crime is in the vehicle, then he can engage in a warrantless search of the vehicle under the automobile exception.

¹⁶¹ *Id.* at 1720.

¹⁶² *Id.*

explained that even though “a motorist’s privacy interest in his vehicle is less substantial than in his home, the former interest is nevertheless deserving of constitutional protection.”¹⁶³

Writing for the Court, Justice Stevens, then the oldest member of the Court, grounded the majority opinion in the Warrant Preference view of the Fourth Amendment. Justice Stevens noted:

Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”¹⁶⁴

Acknowledging that *Belton* had “been widely understood [as allowing] a vehicle search incident to the arrest of a recent occupant even if there [was] no possibility the arrestee could gain access to the vehicle at the time of the search,”¹⁶⁵ Justice Stevens noted that this broad reading of *Belton* had the undesired effect of untethering the *Belton* rule from the original justifications underlying the search incident to arrest exception.¹⁶⁶ Moreover, Justice Stevens noted that *Belton* was based on the faulty assumption that articles within the passenger compartment are generally within the arrestee’s grabbing distance when the arrestee is an occupant or recent occupant of the vehicle. He concluded, “We now know that articles inside the passenger compartment are rarely ‘within the area within which an arrestee might reach.’”¹⁶⁷

In his dissenting opinion, Justice Alito accused the majority of overruling *Belton* without saying so.¹⁶⁸ Somewhat disingenuously, Justice Stevens denied that the Court was overruling *Belton*,¹⁶⁹ claiming it was simply rejecting a popular but erroneous reading of *Belton*.¹⁷⁰ To justify the different results in the two cases, Justice Stevens distinguished the facts in *Gant* from the facts in *Belton*. He pointed out that in *Belton*, a single officer was dealing with four unsecured arrestees.¹⁷¹ In *Gant*, in contrast, there were five officers and only three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched

¹⁶³ *Id.*

¹⁶⁴ *Gant*, 129 S. Ct. at 1716 (quoting *Katz v. United States*, 389 U.S. 347 (1967)).

¹⁶⁵ *Id.* at 1718.

¹⁶⁶ *Id.* at 1719.

¹⁶⁷ *Id.* at 1723 (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)).

¹⁶⁸ *Id.* at 1726 (Alito, J., dissenting).

¹⁶⁹ *Id.* at 1722 n.9.

¹⁷⁰ *Id.* at 1722–23.

¹⁷¹ *Belton*, 453 U.S. at 455–56.

Gant's car.¹⁷² In *Belton*, given the number of arrestees and the fact that they were not handcuffed or secured in the back of a locked patrol car, it was possible that one or more of the four arrestees could have rushed the car, overpowered the one officer, and gained access to weapons or evidence in the car. In *Gant*, it was highly unlikely that the handcuffed arrestees who were locked in the back of separate patrol cars could have harmed any of the officers or accessed evidence in the car. Another key difference between the two cases involved the offense of arrest. The arrestees in *Belton* were arrested for drug offenses and the arresting officer had reason to believe there were drugs in the car because he smelled marijuana and saw an envelope with the label "Supergold" when he walked up to the car.¹⁷³ In *Gant*, the defendant was arrested for driving with a suspended license and there was no reason to believe evidence of this crime would be found in his car.¹⁷⁴

While *Gant* changes what is required to justify the search of a vehicle incident to arrest of an occupant or recent occupant of the vehicle,¹⁷⁵ it does not change the scope of what may be searched. *Belton* is still good law insofar as it defines the permissible scope of a search of a vehicle incident to arrest. Incident to a lawful custodial arrest of a recent occupant of the vehicle, an officer can still only search the passenger compartment of the vehicle, not the trunk.¹⁷⁶ Moreover, *Gant* did not modify the *Belton* definition of a container.

The search incident to arrest exception thus allows an officer who has executed a valid custodial arrest to conduct a warrantless search of (1) containers found on the person of the arrestee,¹⁷⁷ (2) containers within the arrestee's wingspan,¹⁷⁸ and (3) if the arrestee is an occupant or recent occupant of the car, containers in the passenger compartment of the car if the passenger compartment is within the arrestee's reaching distance at the time of the search or the officer has reason to believe there is evidence

¹⁷² *Gant*, 129 S. Ct. at 1719.

¹⁷³ *Belton*, 453 U.S. at 455–56.

¹⁷⁴ *Gant*, 129 S. Ct. at 1719.

¹⁷⁵ Under the prior interpretation of *Belton*, all that was needed to search the passenger compartment of a car was a lawful custodial arrest of an occupant or recent occupant of a vehicle. Under the current reading of *Belton*, in addition to a lawful custodial arrest, the arrestee must be within reaching distance of the passenger compartment at the time of the search or the officer must have reason to believe evidence of the crime of arrest is in the vehicle. See *Gant*, 123 S. Ct. at 1723.

¹⁷⁶ *Id.* at 1720 (“*Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space.”).

¹⁷⁷ *United States v. Robinson*, 414 U.S. 218 (1973).

¹⁷⁸ *Chimel v. California*, 395 U.S. 752 (1969).

regarding the crime of arrest in the car.¹⁷⁹ The officer need not demonstrate that he had probable cause to believe the container being searched contained contraband or evidence of a crime.

B. SEARCHES OF CONTAINERS UNDER THE AUTOMOBILE EXCEPTION

The most significant incursions on the Container Doctrine have occurred in the context of container searches in automobiles. Not only can police officers search containers in the passenger compartment of a car incident to a lawful custodial arrest under the circumstances described above, but under the automobile exception to the warrant requirement, police may also search any part of a motor vehicle, including containers within, as long as they have probable cause to believe contraband or evidence of a crime will be found within the vehicle.¹⁸⁰ Probable cause is the only requirement for a valid automobile exception search.¹⁸¹ It is not necessary for the government to show exigent circumstances or that it would have been impracticable to obtain a warrant in advance.¹⁸²

Warrantless searches of automobiles under the automobile exception are allowed for two reasons. First, the ready mobility of a motor vehicle makes it impracticable for law enforcement officers to secure a search warrant.¹⁸³ Second, individuals supposedly have diminished expectations of privacy in motor vehicles because motor vehicles are subject to pervasive governmental regulation.¹⁸⁴

Before 1991, whether police needed a warrant to search a container found in a car depended on whether the officer had probable cause to

¹⁷⁹ *Gant*, 129 S. Ct. 1710 (2009).

¹⁸⁰ *Carroll v. United States*, 267 U.S. 132 (1925). For an excellent critique of the automobile exception, see Lewis R. Katz, *The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement*, 36 CASE W. RES. L. REV. 375 (1986) (arguing that the automobile exception has become a public place exception, eliminating the warrant requirement for effects found in public places).

¹⁸¹ *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (holding that probable cause alone satisfies the automobile exception to the Fourth Amendment).

¹⁸² *Id.* at 466–67 (“[U]nder our established precedent, the ‘automobile exception’ has no separate exigency requirement.”).

¹⁸³ *California v. Carney*, 471 U.S. 386, 390–91 (1985).

¹⁸⁴ *Id.* at 391. Those who drive frequently may disagree with the Court’s assumption that individuals have diminished expectations of privacy in their cars. At least eighty-four million Americans drive to work alone in their cars each day. See David A. Harris, *Car Wars: The Fourth Amendment’s Death on the Highway*, 66 GEO. WASH. L. REV. 556, 576 (1998) (noting that “[d]espite the congestion, expense, and environmental damage caused by cars, most Americans go to work in private vehicles” and “more than eighty-four million drive to work alone” while “another fifteen million travel in car pools”). These drivers do not expect government officials to inspect the contents of their vehicles, even though they may be subject to annual inspections for safety and emissions purposes.

believe there was evidence of a crime somewhere within the vehicle or in a container in the vehicle.¹⁸⁵ In *United States v. Ross*, the Court held that if a police officer had probable cause to believe there was contraband or evidence of a crime somewhere in a vehicle, he could search every part of the vehicle, including containers that could hold the object of the search.¹⁸⁶ In contrast, if the officer had probable cause to believe evidence of a crime would be found in a container and nowhere else in the car, then the officer had to get a warrant in order to search that container.¹⁸⁷ In other words, if the officer had probable cause as to the car in general, i.e., a reasonable belief that there was contraband or evidence of a crime somewhere within the car, the automobile exception applied, and the officer did not need a warrant to search the car. If, on the other hand, the officer had probable cause specific to a container in the car, i.e., a reasonable belief that contraband or evidence of a crime was inside a container that happened to be in the car, then the Container Doctrine applied, and the officer had to obtain a warrant to search the container.

Adhering to the Warrant Preference view, the *Ross* Court noted that “[t]he Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”¹⁸⁸ The *Ross* Court reaffirmed *Sanders* and the Container Doctrine as it applied to containers in cars.

In *California v. Acevedo*, the Court abandoned the careful distinction drawn in *Ross* between permissible and impermissible searches of containers in cars.¹⁸⁹ While proclaiming fidelity to the Warrant Preference

¹⁸⁵ *United States v. Ross*, 456 U.S. 798 (1982).

¹⁸⁶ *Id.* at 825. The *Ross* Court was careful to note that it was not overruling *Arkansas v. Sanders*. *Id.* at 824.

¹⁸⁷ *California v. Acevedo*, 500 U.S. 565, 572 (1991) (explaining that under *Ross*, the *Carroll* doctrine covered searches of automobiles where the police had probable cause to search an entire vehicle, but *Chadwick* governed if the officer had probable cause to search only a container within a vehicle); see also Bradley, *supra* note 126, at 438 (noting that until *Acevedo*, “if police had probable cause only to search a suitcase or other container found in an automobile, they had to obtain a search warrant before opening the container,” but “if they had probable cause to search the automobile generally, then they could search it fully, including opening any containers found therein”); Katz, *supra* note 21, at 417 (noting that by not overruling *Sanders*, the *Ross* Court left intact the rule that police “may not rely upon the broad warrant exemption for automobiles to search containers found in a vehicle when the probable cause focused upon the container prior to being placed in the automobile”).

¹⁸⁸ *Ross*, 456 U.S. at 825 (quoting *Katz v. United States*, 389 U.S. 327 (1967)).

¹⁸⁹ 500 U.S. at 565.

view,¹⁹⁰ the *Acevedo* Court essentially eliminated the warrant requirement for containers in cars, holding that a warrant is not necessary to search a container in a car as long as police officers have probable cause to believe evidence of a crime will be found in that container.¹⁹¹ The Court justified this holding by finding that such searches fell within the automobile exception, an exception that was “specifically established and well delineated.”¹⁹²

The Court provided three rationales for its new rule. First, the Court opined that the *Ross* rule encouraged broader searches than the rule it announced.¹⁹³ Under *Ross*, police officers wishing to search a container in a car without getting a warrant needed probable cause to search the entire car.¹⁹⁴ To establish such broad probable cause, the *Acevedo* Court opined, police would be tempted to search the entire car rather than just the container.¹⁹⁵

The problem with this argument is that police cannot manufacture probable cause to search a car by searching the entire car. Whether or not an officer has probable cause to believe evidence of a crime will be found somewhere in the car must be determined on the basis of the facts known to the officer prior to the search. If the facts and circumstances known to the officer before the search would have led him to believe evidence of a crime could only be found in a container in a car, then a search of the entire car will not change those facts and circumstances. Under *Ross*, the officer under such circumstances would only be allowed to search the container, not the entire car.

Second, the *Acevedo* Court expressed doubt as to whether the Container Doctrine substantially protects privacy interests.¹⁹⁶ If the police have probable cause to seize a container, the Court reasoned, a search

¹⁹⁰ *Id.* at 580 (noting that it “remains a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions”) (internal quotations omitted).

¹⁹¹ *Id.* at 579.

¹⁹² *Id.* at 580.

¹⁹³ *Id.* at 574 (“The line between probable cause to search a vehicle and probable cause to search a package in that vehicle is not always clear, and separate rules that govern the two objects to be searched may enable the police to broaden their power to make warrantless searches . . .”).

¹⁹⁴ *United State v. Ross*, 456 U.S. 798, 825 (1982).

¹⁹⁵ 500 U.S. at 574–75 (“If the police know that they may open a bag only if they are actually searching the entire car, they may search more extensively than they otherwise would in order to establish the general probable cause required by *Ross*.”).

¹⁹⁶ *Id.* at 575 (“To the extent that the *Chadwick-Sanders* rule protects privacy, its protection is minimal.”).

warrant will generally be forthcoming.¹⁹⁷ In other words, a judicial magistrate will likely agree with the officer's assessment of probable cause and issue a warrant.

The problem with this argument is that it completely disregards the reason why warrants are usually required in the first instance. We want the probable cause determination to be made by a neutral and detached judicial officer, not someone who is in the business of enforcing the law. While the police officer's conclusion that there is probable cause to search may often be correct, it is also possible that a judicial officer will disagree with the officer's assessment of the situation. To say that we should dispense with the warrant requirement because the officer has already decided there is probable cause, and a warrant is therefore likely to be forthcoming, is to miss this critical point.

Third, the *Acevedo* Court stressed the need for a bright-line rule to guide law enforcement officers in the field.¹⁹⁸ The Court felt the discrepancy between the *Carroll* doctrine (the automobile exception) and the *Chadwick-Sanders* rule (the Container Doctrine) had confused law enforcement, and the rule it was announcing would be easier for police officers in the field to apply.¹⁹⁹ The problem with this rationale is that the administrative convenience that bright-line rules provide to police should not trump the constitutional rights of individual citizens.²⁰⁰ In the words of Justice Brennan, "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."²⁰¹

In a harsh critique of the Container Doctrine, the *Acevedo* Court noted, "The *Chadwick-Sanders* rule not only has failed to protect privacy but also has confused courts and police officers and impeded effective law enforcement."²⁰² The Court then explicitly overruled *Sanders* and established the rule that governs containers in cars today: if police have probable cause to believe that evidence of crime is inside a container that

¹⁹⁷ *Id.* ("Since the police, by hypothesis, have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases.") (internal quotation omitted).

¹⁹⁸ *Id.* at 579 ("We conclude that it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed containers set forth in *Sanders*.").

¹⁹⁹ *Id.* at 577 ("The discrepancy between the two rules has led to confusion for law enforcement officers.").

²⁰⁰ *United States v. Robinson*, 414 U.S. 218, 258 n.7 (1973) (Marshall, J., dissenting) ("[A]dministrative inconvenience . . . cannot justify invasion of Fourth Amendment rights . . .").

²⁰¹ *New York v. Belton*, 453 U.S. 454, 469 (1981) (Brennan, J., dissenting) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)).

²⁰² 500 U.S. at 576.

happens to be in a car, they can search that container without a warrant.²⁰³ If police have probable cause to believe that evidence of a crime is somewhere inside a vehicle, they can search anywhere within the vehicle, including any and all containers in the vehicle, that might hold the object of the search.²⁰⁴ If probable cause is limited to the container, police can search the container but cannot search anywhere else in the vehicle.²⁰⁵

While critical of the Container Doctrine, the *Acevedo* Court did not eliminate it completely. Police still need a warrant to search a container found on the street, as opposed to one found in a motor vehicle.²⁰⁶ Justice Scalia noted that this created an anomaly.²⁰⁷ If police have probable cause to believe there is evidence of a crime in a container carried by a person on the street and do not have probable cause to arrest that person, they cannot search the container unless they get a warrant.²⁰⁸ If the person puts that container in a car, then all of a sudden police can search the very same container without a warrant.²⁰⁹ Indeed, in *Acevedo*, the police waited until *Acevedo* placed the paper bag that they believed contained drugs into the trunk of his car before attempting to search it,²¹⁰ presumably because the police knew they would need a warrant if they seized the bag on the street.²¹¹

In *Wyoming v. Houghton*, the Court further reduced protections for containers in cars when it held that probable cause to believe that the driver of a vehicle has illegal drugs in the car gives the police the authority to conduct a warrantless search of a passenger's purse found on the backseat floor of the passenger compartment, even if the police have no particularized reason to believe drugs are in the passenger's purse.²¹² Writing for the *Houghton* Court in 1999, Justice Scalia did not even pay lip

²⁰³ *Id.* at 580.

²⁰⁴ *Id.* ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.").

²⁰⁵ *Id.*

²⁰⁶ See Bradley, *supra* note 126, at 439 ("If such a suitcase or briefcase is not found in a vehicle, *Acevedo* suggests that *Chadwick* will still apply.").

²⁰⁷ *Acevedo*, 500 U.S. at 584 (Scalia, J., concurring).

²⁰⁸ *Id.* (Scalia, J., concurring).

²⁰⁹ *Id.* (Scalia, J., concurring).

²¹⁰ *Id.* at 567.

²¹¹ This inconsistency between the no warrant required rule for containers in automobiles and the warrant requirement rule for containers on the street created by the *Acevedo* decision prompted one scholar, James Tomkovicz, to predict the imminent demise of the Container Doctrine. Tomkovicz, *supra* note 20, at 1115 ("At the very least, the Court is poised to abandon *Chadwick* and to exempt all searches outside of private buildings from the rule that warrantless searches are per se unreasonable.").

²¹² *Wyoming v. Houghton*, 526 U.S. 295 (1999).

service to the Warrant Preference view, quoting only the first part of the Fourth Amendment: “The Fourth Amendment protects ‘the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’”²¹³ Justice Scalia then gave a plug to what David Sklansky has called the Court’s new Fourth Amendment originalism:²¹⁴

In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.²¹⁵

Looking to early common law history, Justice Scalia found that the search of Houghton’s purse was lawful because customs officials in the eighteenth century had the right to search containers on ships and vessels without a warrant. Notwithstanding the fact that there is a big difference between a ship that carries many passengers and their cargo and a car that is owned and operated by a single individual for that individual’s personal use, Justice Scalia explained:

[T]he Framers would have regarded such a search as reasonable in light of legislation enacted by Congress from 1789 through 1799—as well as subsequent legislation from the founding era and beyond—that empowered customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it contained goods subject to a duty During virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of the vehicle would include a search of any container that might conceal the object of the search.²¹⁶

Justice Scalia concluded that if an officer has probable cause to search a car, he can examine any and all containers within the car that might hold the object of the search without needing a particularized showing of probable cause for each container.²¹⁷ Under this reasoning, the warrantless search of Houghton’s purse did not violate the Fourth Amendment even

²¹³ *Id.* at 299.

²¹⁴ David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1760 (2000) (“The full Court had hinted at sympathy for Scalia’s new Fourth Amendment originalism in *Wilson v. Arkansas*, and finally embraced it in *Wyoming v. Houghton*.”).

²¹⁵ *Wyoming v. Houghton*, 526 U.S. at 299–300.

²¹⁶ *Id.* at 300–01.

²¹⁷ *Id.* at 302 (“When there is probable cause to search for contraband in a car, it is reasonable for police officers—like customs officials in the founding era—to examine packages and containers without a showing of individualized probable cause for each one.”).

though the officer had no reason to suspect the passenger was hiding drugs or contraband in her purse.

Interestingly, Justice Scalia drew a distinction between searches of passengers (searches of the person) and searches of property belonging to passengers, suggesting that the heightened expectations of privacy that attend to one's person do not attend to one's property and that a warrant might be required for a search of a passenger's person.²¹⁸ Justice Breyer, concurring in *Houghton*, went further and opined that property found on a passenger's person, such as a wallet in a male passenger's pants pocket or a purse carried by a female passenger, should be treated differently than property found at a distance from the passenger.²¹⁹ Justice Breyer viewed the search of a wallet or a purse carried by a passenger as a search of the person, rather than as merely a search of property.²²⁰ As of the writing of this Article, the full Court has not yet decided whether a warrant is required for the search of a container found on the person of the passenger when the officer has probable cause to believe the car contains contraband or evidence of a crime incriminating the driver, but no probable cause specific to the container.

In sum, under the automobile exception to the warrant requirement, an officer with probable cause to believe there is contraband or evidence of a crime within a motor vehicle²²¹ may search that vehicle and any containers within that could contain the object of the search.²²² Without any further justification, the officer can even search a container belonging to a passenger that is not directly on the passenger's person as long as the object of the search might be hidden in that container.²²³ If the probable cause is specific to a container in a car, the officer can search the container without a warrant but may not search anywhere else in the car.²²⁴

²¹⁸ *Id.* at 303 (distinguishing the instant case from *United States v. Di Re*, 332 U.S. 581 (1948) and *Ybarra v. Illinois*, 444 U.S. 85 (1979) on the ground that those two cases involved searches of persons whereas this case involved a search of property).

²¹⁹ *Id.* at 308 (Breyer, J., concurring) ("But I can say that it would matter if a woman's purse, like a man's billfold, were attached to her person. It might then amount to a kind of 'outer clothing' In this case, the purse was separate from the person . . .").

²²⁰ *Id.*

²²¹ The Court has held that a motor home parked on a public street is a motor vehicle for purposes of the automobile exception. *California v. Carney*, 471 U.S. 386, 394–95 (1985).

²²² *California v. Acevedo*, 500 U.S. 565, 580 (1991) ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.").

²²³ *Houghton*, 526 U.S. at 302.

²²⁴ *Acevedo*, 500 U.S. at 579–80.

C. CONSENT SEARCHES

Another way police can search a container without a warrant despite the Container Doctrine is by obtaining consent to search the general area where the container is found. Consent to search a car has been construed by the Supreme Court to include consent to search unlocked containers within the car that could hold the object of the search.²²⁵ A consent search is valid as long as the consent is given voluntarily.²²⁶ It is not necessary for the officer to tell the individual of his or her right to refuse consent.²²⁷

In *Florida v. Jimeno*, the Court established the reasonable person test used today for determining the scope of an individual's consent to search.²²⁸ The Court also made it easier for a police officer who obtains consent to search a car to search a container within the car even when the owner of the car does not explicitly consent to a search of the container.²²⁹

In *Florida v. Jimeno*, an officer overheard the defendant, Enio Jimeno, arrange "what appeared to be a drug transaction over a public telephone."²³⁰ When Jimeno drove away, the officer followed. After seeing Jimeno turn right on red without stopping, the officer pulled Jimeno over to issue a traffic citation.²³¹ The officer told Jimeno that he was being stopped for

²²⁵ *Florida v. Jimeno*, 500 U.S. 248, 251–52 (1991).

²²⁶ *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

²²⁷ *Id.* at 231. For an excellent critique of the Court's consent jurisprudence and an argument that consent searches should be completely banned, see Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211 (2002). See also Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27 (2008) (arguing that whenever a person refuses to provide consent, that refusal should bar further attempts by the police to seek consent); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153 (applying insights from social psychology to the question of whether one can voluntarily consent to a search requested by a police officer); Dana Raigrodski, *Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches*, 16 HASTINGS WOMEN'S L.J. 37 (2004) (arguing that the consent doctrine is flawed because the Court constructs the notion of consent from a male perspective); Josephine Ross, *Blaming the Victim: 'Consent' Within the Fourth Amendment and Rape Law*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 1 (2010) (applying insights from the feminist critique of rape law to the doctrine of consent in the Fourth Amendment arena); Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. (forthcoming 2011) (using political theory to challenge the Court's broad interpretation of the concept of consent in the search, confession, and plea contexts) (manuscript at 1) (on file with author).

²²⁸ *Jimeno*, 500 U.S. at 251. The test asks what the typical reasonable person would have understood by the exchange between the officer and the suspect. *Id.*

²²⁹ *Id.* at 252 (stating that reasonableness does not require police officers to "separately request permission to search each container").

²³⁰ *Id.* at 249.

²³¹ *Id.*

committing a traffic violation and that he had reason to believe Jimeno was carrying narcotics, and then asked for permission to search Jimeno's car.²³² Jimeno told the officer he had nothing to hide and gave the officer permission to search the car.²³³ The officer saw a brown paper bag on the floorboard of the car, opened it, and found a kilogram of cocaine within.²³⁴

Jimeno was charged with possession with intent to distribute cocaine.²³⁵ Before trial, he moved to suppress the cocaine found inside the paper bag on the ground that his "consent to search the car did not extend to the closed paper bag inside of the car."²³⁶ The trial court granted the motion to suppress, finding that the defendant's consent to search the car did not include consent to search the paper bag inside the car.²³⁷ The Florida District Court of Appeal affirmed, holding that "consent to a general search for narcotics does not extend to sealed containers within the general area agreed to by the defendant."²³⁸ The Florida Supreme Court affirmed.²³⁹

Writing for the Court in 1991, Chief Justice Rehnquist began his analysis by embracing the Separate Clauses view of the Fourth Amendment, opining that "[t]he touchstone of the Fourth Amendment is reasonableness."²⁴⁰ He continued by stating, "The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable."²⁴¹

With this focus on reasonableness, Chief Justice Rehnquist explained that a court trying to measure the scope of a suspect's consent should apply an objective reasonableness standard and ask: "what would the typical reasonable person have understood by the exchange between the officer and the suspect?"²⁴² Despite the fact that all three of the Florida courts that had considered Jimeno's motion to suppress found that Jimeno's consent to search the car did not mean he was giving consent to search the paper bag inside the car, the Court reversed the judgment of the Supreme Court of Florida on the ground that a reasonable person would have understood the exchange between the officer and Jimeno to mean that Jimeno had

²³² *Id.*

²³³ *Id.* at 249–50.

²³⁴ *Id.* at 250.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *State v. Jimeno*, 550 So. 2d 1176, 1176 (Fla. Dist. Ct. App. 1989).

²³⁹ *State v. Jimeno*, 564 So. 2d 1083 (1990).

²⁴⁰ *Jimeno*, 500 U.S. at 250.

²⁴¹ *Id.*

²⁴² *Id.* at 251.

consented to a search of the paper bag.²⁴³ Justice Rehnquist explained that in light of the fact that the officer had informed Jimeno that he believed Jimeno was carrying drugs, it was objectively reasonable for the officer to conclude that Jimeno's general consent to search the car included his specific consent to search any containers within the car that might contain drugs.²⁴⁴ Justice Rehnquist further noted that "[a] reasonable person may be expected to know that narcotics are generally carried in some form of container," not "strewn across the trunk or floor of the car."²⁴⁵

In his dissent, Justice Marshall pointed out that "[b]y the same logic a person who consents to a search of the car . . . could also be deemed to consent to a search of his person or indeed of his body cavities, since a reasonable person may be expected to know that drug couriers frequently store their contraband on their persons or in their body cavities,"²⁴⁶ yet a reasonable person would probably understand that a person who consents to a search of his car for drugs does not consent to a search of his person for drugs.²⁴⁷ Justice Marshall reminded the Court that just as individuals have heightened expectations of privacy in their persons, they have heightened expectations of privacy in their containers.²⁴⁸

In an interesting departure from previous Court statements about whether the Court should draw a distinction between locked and unlocked containers,²⁴⁹ Justice Rehnquist suggested that a locked briefcase might be treated differently than a closed paper bag, writing, "It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag."²⁵⁰ While Justice Rehnquist did not explain why he thought it would be unreasonable to think that consent to search a car would include consent to search a *locked* container within the car, one obvious reason is the heightened expectation of privacy one presumably has in the contents of a container that one has gone to the trouble of locking.

Justice Rehnquist's suggestion that a locked briefcase is entitled to more protection than a closed paper bag was contrary to previous

²⁴³ *Id.* at 250–51.

²⁴⁴ *Id.* at 251.

²⁴⁵ *Id.* (quoting *United States v. Ross*, 456 U.S. 798, 820 (1982)).

²⁴⁶ *Id.* at 255 (Marshall, J., dissenting).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 253.

²⁴⁹ See *Ross*, 456 U.S. 822 (noting that the Court was in unanimous agreement in *Robbins v. California* that a constitutional distinction between "worthy" and "unworthy" containers would be improper).

²⁵⁰ *Jimeno*, 500 U.S. at 251–52.

pronouncements by the Court on this issue. As Justice Marshall pointed out in his dissent, the Court “has soundly rejected any distinction between ‘worthy’ containers, like locked briefcases, and ‘unworthy’ containers, like paper bags.”²⁵¹ Quoting from *United States v. Ross*, Justice Marshall noted:

For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.²⁵²

Florida v. Jimeno establishes that when an officer specifies what he is looking for, consent to search one’s car includes consent to search unlocked containers within the car that could be concealing the object of the search.²⁵³ At least one state court has held that when an officer at a safety roadblock fails to specify the object of his search, an individual’s unrestricted consent to search his car does not extend to containers within the car.²⁵⁴ Accordingly, a person who consents to a police search of his car for drugs consents to letting the officer search unlocked containers within the car that might contain drugs.²⁵⁵

D. THE *TERRY* STOP AND FRISK DOCTRINE

1. *Terry v. Ohio’s Embrace of the Separate Clauses/Reasonableness Approach*

The *Terry* stop and frisk doctrine provides another avenue for warrantless searches of containers carried by persons on the street.²⁵⁶ Although the *Terry* decision did not involve a container search, subsequent cases have extended *Terry* to cover such searches.²⁵⁷ In *Terry v. Ohio*, the Court held that an officer can stop, i.e., briefly detain, an individual based upon a particularized suspicion, later deemed “reasonable suspicion,” of

²⁵¹ *Id.* at 254 (Marshall, J., dissenting).

²⁵² *Id.* (quoting *Ross*, 456 U.S. at 822).

²⁵³ *Id.* at 251.

²⁵⁴ See *State v. Sargent*, 984 A.2d 831, 834–35 (Me. 2009).

²⁵⁵ While *Jimeno* involved consent to search a car, one can see how the reasoning of *Jimeno* could be extended to the home such that a homeowner’s consent to search a home could be construed to include consent to search any unlocked containers in the home that might contain the object of the search.

²⁵⁶ For enlightening discussion and critique of the *Terry* stop and frisk doctrine, see Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 *MISS. L.J.* 423 (2004); Christopher Slobogin, *Let’s Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 *ST. JOHN’S L. REV.* 1053 (1998); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 *NYU L. REV.* 956 (1999).

²⁵⁷ See *infra* text accompanying notes 271–291.

criminal activity.²⁵⁸ Furthermore, if the officer can point to specific and articulable facts giving rise to a reasonable belief that the individual stopped is armed and dangerous, the officer can conduct a limited pat-down frisk of the individual to make sure he cannot access a weapon that he could use against the officer.²⁵⁹ The sole purpose of a *Terry* frisk must be to look for weapons, not contraband or evidence of a crime.²⁶⁰

The *Terry* decision, written in 1968—before the Court established the Container Doctrine—signaled the Court’s early willingness to view the two clauses of the Fourth Amendment as separate and independent, rather than interconnected, clauses. Writing for a nearly unanimous court, Chief Justice Earl Warren quoted the words of the Fourth Amendment,²⁶¹ then noted, “[W]hat the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.”²⁶² Later in the opinion, he remarked that “the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.”²⁶³

The *Terry* Court did not completely abandon its prior embrace of the Warrant Preference view.²⁶⁴ It sought to explain its adoption of the

²⁵⁸ *Terry v. Ohio*, 392 U.S. 1, 22–23 (1968). As Lewis Katz notes, “Chief Justice Warren’s majority opinion [in *Terry v. Ohio*] never used the term ‘reasonable suspicion,’ instead writing of ‘unusual conduct’ which leads a police officer ‘reasonably to conclude in light of his experience that criminal activity may be afoot.’” Katz, *supra* note 256, at 486 (“It was only in Justice Harlan’s concurring opinion in *Sibron* that the ‘reasonable suspicion’ standard was articulated.”) (citing *Sibron v. New York*, 392 U.S. 40 (1968)).

²⁵⁹ *Terry*, 392 U.S. at 27 (“Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer; where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual . . .”). In his concurring opinion, Justice Harlan clarified that the officer must first have the right to stop the individual before he can frisk him. *Id.* at 32 (Harlan, J., concurring) (“[T]he officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop.”). If the officer reasonably suspects that the person is engaging or has engaged in a crime of violence, the right to frisk flows automatically from the right to stop the individual. *Id.* at 33 (“[T]he right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence.”).

²⁶⁰ *Id.* at 29 (“The sole justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”).

²⁶¹ *Id.* at 8.

²⁶² *Id.* at 9 (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)).

²⁶³ *Id.* at 19.

²⁶⁴ *Id.* at 20.

Reasonableness view by claiming that the case before it did not involve police conduct subject to the Warrant Clause of the Fourth Amendment:

We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances. But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment’s general proscription against unreasonable searches and seizures.²⁶⁵

The *Terry* Court’s embrace of the Reasonableness view of the Fourth Amendment was a clear departure from precedent. As Earl C. Dudley, Jr., who was one of Chief Justice Earl Warren’s law clerks at the time *Terry* was decided, notes, “[T]he Court had historically read the Fourth Amendment’s two clauses *in pari materia* [i.e., construed together]. The Warrant Clause’s standard of ‘probable cause’ had been taken to define the ‘reasonableness’ of a search and seizure, even where obtaining a warrant was excused as impracticable.”²⁶⁶

Surprisingly, it was Justice Brennan, known as one of the most liberal Justices on the Court and a staunch defender of the Warrant Preference view,²⁶⁷ who first suggested that the two clauses in the Fourth Amendment should be read as separate and distinct commands.²⁶⁸ Dudley notes that it was Justice Brennan who argued that “[i]n a context—swiftly developing

²⁶⁵ *Id.* (citations omitted).

²⁶⁶ Earl C. Dudley, Jr., *Terry v. Ohio, the Warren Court, and the Fourth Amendment: A Law Clerk’s Perspective*, 72 ST. JOHN’S L. REV. 891, 894 (1998).

²⁶⁷ See, e.g., *Horton v. California*, 496 U.S. 128, 143 (1990) (Brennan, J., dissenting) (“The Amendment protects [the interest in privacy and the possessory interest in property] in precisely the same manner: by requiring a neutral and detached magistrate to evaluate, before the search or seizure, the government’s showing of probable cause and its particular description of the place to be searched and the items to be seized.”); *United States v. Montoya de Hernandez*, 473 U.S. 531, 552 (1985) (Brennan, J., dissenting) (“Though the Fourth Amendment speaks broadly of ‘unreasonable searches and seizures,’ the definition of ‘reasonableness’ turns, at least in part, on the more specific commands of the warrant clause.”) (quoting *United States v. United States Dist. Ct.*, 407 U.S. 297, 315 (1972) (internal quotation omitted)); *Illinois v. Andreas*, 463 U.S. 765, 774 (1983) (Brennan, J., dissenting) (“I suppose one should be grateful that the Court has not explicitly opened one more breach in the general rule that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”) (quoting *United States v. Ross*, 456 U.S. 798, 825 (1982)).

²⁶⁸ Dudley, *supra* note 266, at 894 (“It was Justice Brennan who suggested, after the initial Warren draft had sat for several weeks without collecting any votes, what emerged eventually as the doctrinal solution—the analytical separation of the amendment’s two clauses.”).

street encounters—where obtaining a warrant was inherently impracticable . . . the strictures of the Warrant Clause were simply inapplicable, and the definition of a ‘reasonable’ search could and should be cut free from the standard of ‘probable cause.’”²⁶⁹ Justice Brennan’s suggestion was incorporated into the final draft of the *Terry* opinion, and prompted Justice Douglas to dissent.²⁷⁰

2. The Plain Feel Exception Extended to Cover Container Searches

The Container Doctrine has further been eroded by the Court’s recognition of a plain feel exception to the warrant requirement. In 1993, the Court in *Minnesota v. Dickerson* extended the plain view doctrine²⁷¹ to the sense of touch, holding that when an officer conducting a lawful *Terry* frisk feels an object whose incriminating character is immediately apparent and the officer has probable cause to believe the object is (or contains) contraband or evidence of a crime, the officer may seize that object without stopping to get a warrant.²⁷² Under the plain feel exception, evidence may be admitted if (1) the officer had a lawful right of access to the item as he would if he were conducting a lawful *Terry* stop,²⁷³ (2) the officer had probable cause to believe the item is (or contains) contraband or evidence of a crime,²⁷⁴ and (3) the incriminating nature of the item was immediately

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 895.

²⁷¹ See *Arizona v. Hicks*, 480 U.S. 321, 323, 326–27 (1987) (explaining the plain view doctrine).

²⁷² *Minnesota v. Dickerson*, 508 U.S. 366, 375–76 (1993). In *Dickerson*, two police officers were patrolling a neighborhood at night in a marked police car. They saw a man leaving an apartment building known to the officers as a crack house. The man began walking towards the officers, but upon seeing the squad car and making eye contact with one of the officers, abruptly halted and began walking in the opposite direction. Based on the man’s evasive actions and the fact that he had just left a building known for cocaine trafficking, the officers decided to stop and frisk the man. During the frisk, one officer felt a lump in the man’s front pocket. After squeezing, sliding, and otherwise manipulating the contents of the man’s pocket with his fingers, the officer determined that the lump was crack cocaine wrapped in cellophane. The officer reached into the defendant’s pocket and pulled out a small plastic bag containing a fifth of a gram of crack cocaine. The defendant was arrested and charged with possession of a controlled substance. Before trial, the defendant moved to suppress the drugs found during the pat-down frisk. *Id.* at 368–69.

²⁷³ *Id.* at 375 (“If a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons . . .”).

²⁷⁴ *Id.* at 376 (“Regardless of whether the officer detects the contraband by sight or by touch, however, the Fourth Amendment’s requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.”).

apparent to the officer.²⁷⁵ Because the officer in *Dickerson* had to squeeze and manipulate the lump in order to determine that it was a baggy filled with cocaine, the incriminating character of the object in this case was not immediately apparent to the officer, and the seizure of the cocaine was deemed unconstitutional.²⁷⁶

Ironically, the *Dickerson* Court endorsed the Warrant Preference view of the Fourth Amendment, noting “[t]ime and again, this Court has observed that searches and seizures ‘conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.’”²⁷⁷ Even though the search at issue did not fall within a specifically established and well-delineated exception, the Court created a new exception to the warrant requirement—the plain feel exception—then found that the search in question failed to meet the requirements of this new exception.²⁷⁸

Although *Dickerson* spoke only to the lawfulness of the seizure of an object found during a lawful *Terry* frisk, lower courts have relied upon *Dickerson* to permit searches as well as seizures of containers found on a suspect during a lawful *Terry* frisk.²⁷⁹ For example, in *Ball v. United States*, the District of Columbia Court of Appeals held that drugs found in a large medicine bottle during the course of a lawful *Terry* frisk were admissible under the plain feel doctrine even though touching alone could not have revealed the presence of contraband inside the medicine bottle.²⁸⁰

Ball was a passenger in a vehicle stopped because it lacked a front license plate.²⁸¹ The officer who stopped the car noticed that Ball kept reaching toward his jacket’s center pocket even though the officer kept telling him not to do so.²⁸² When Ball reached for his jacket pocket for a third time, the officer decided to frisk him. During the frisk, the officer

²⁷⁵ *Id.* at 379 (“Although the officer was lawfully in a position to feel the lump in respondent’s pocket, because *Terry* entitled him to place his hands upon respondent’s jacket, the court below determined that the incriminating character of the object was not immediately apparent to him.”).

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 372 (quoting *Thompson v. Louisiana*, 469 U.S. 17, 19–20 (1984)) (internal quotes omitted).

²⁷⁸ *Id.* at 375.

²⁷⁹ *See, e.g., United States v. Rogers*, 129 F.3d 76, 79–80 (2d Cir. 1997) (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 375–76, 377, 378 (1993)) (affirming district court’s ruling that admission of cocaine found in paper bag removed from defendant during a pat-down frisk was proper).

²⁸⁰ *Ball v. United States*, 803 A.2d 971, 982 (D.C. 2002).

²⁸¹ *Id.* at 973.

²⁸² *Id.*

“felt a large cylinder container which [he] thought to be a large medicine bottle.”²⁸³ The officer testified that he immediately thought “it was some kind of contraband or narcotics because [Ball had] made several attempts to go into his pocket and remove it.”²⁸⁴ The officer removed the medicine bottle from Ball’s pocket, opened it, and found a number of Ziploc bags containing a white rock-like substance, which turned out to be drugs.²⁸⁵

Ball was charged with unlawful possession with intent to distribute a controlled substance.²⁸⁶ Before trial, Ball moved to suppress the drugs found in the medicine bottle on the ground that the officer had exceeded the scope of a lawful *Terry* frisk.²⁸⁷ At the suppression hearing, the officer testified that he had been involved in more than 100 drug-related arrests, that he was familiar with the ways drugs are packaged and hidden, and that he had arrested many people who hid illegal narcotics in medicine bottles.²⁸⁸ The trial court found that Ball’s actions gave the officer a reasonable basis to believe Ball might be armed, justifying a *Terry* frisk for weapons.²⁸⁹ Conflating the immediately apparent requirement with the probable cause requirement, the trial court found that the object in Ball’s pocket was immediately apparent to the officer as a medicine bottle and that the officer had probable cause to believe the medicine bottle contained narcotics given “the combination of feeling the bottle, knowing it was a bottle, the size of the bottle, the experience of the officer with regard to the packaging of narcotics in this kind of container and the defendant’s actions.”²⁹⁰ Even though it could not have been immediately apparent to the officer that the hard cylindrical container he felt contained contraband as opposed to vitamins or some other lawful substance, the District of Columbia Court of Appeals affirmed, finding that in light of Ball’s suspicious conduct and the officer’s extensive experience with the practices of drug traffickers, the officer had probable cause to believe there were illegal drugs in the medicine bottle and therefore the warrantless search of the medicine bottle was justified under the plain feel doctrine.²⁹¹

²⁸³ *Id.* (internal quotation marks omitted).

²⁸⁴ *Id.*

²⁸⁵ *See id.*

²⁸⁶ *Id.* at 972.

²⁸⁷ *Id.* at 974.

²⁸⁸ *Id.* at 973.

²⁸⁹ *Id.* at 973–74.

²⁹⁰ *Id.* at 974.

²⁹¹ *Id.* In contrast, the Alabama Supreme Court found that the warrantless search of a Tic Tac box found during a lawful *Terry* frisk was not justified under the plain feel doctrine even though the police officer who conducted the search testified that in previous cases, he had come across the same type of plastic container and the containers in those cases had concealed drugs. *Ex parte Warren*, 783 So. 2d 86, 88 (Ala. 2000). The Alabama Supreme

The trial court was correct to find there was reasonable suspicion to support the frisk. Ball kept trying to reach for something in his jacket pocket even though the officer told him not to do so. The officer could have reasonably believed Ball was trying to reach for a weapon. The court, however, erroneously found that the warrantless search of the medicine bottle was justified under the plain feel doctrine. While the officer may have had reasonable grounds to believe that there were drugs in the medicine bottle, its contents could not have been immediately apparent to the officer. When the officer found the medicine bottle, he should have seized it and then sought a warrant to search it. Once the medicine bottle was within the officer's exclusive possession and control, there was little danger that Ball could have obtained a weapon or destroyed any evidence within the container.

3. Conflating the Reasonable Suspicion Needed to Stop with the Reasonable Suspicion Needed to Frisk and Extending Terry to Include Frisks of Containers on the Person

One problem with the *Terry* stop and frisk doctrine is that courts often conflate the justification required for a stop with the justification required for a frisk. As discussed earlier, an officer may stop an individual if the officer has a reasonable suspicion that the individual is engaged in criminal activity or has committed a traffic violation.²⁹² Once the officer has lawfully stopped an individual, he may then conduct a limited pat-down frisk of the individual if the officer has a reasonable suspicion that the individual is armed and dangerous.²⁹³ In other words, the officer needs two

Court held that the drugs in the Tic Tac box had to be excluded because the incriminating character of the contents of the hard-shell container could not have been immediately apparent to the officer and the officer could not have had probable cause to believe the container contained contraband before he opened it. *Id.* at 94. The court recognized that there is a split of authority amongst the lower courts over whether the seizure of a container such as a Tic Tac box, matchbox, pill bottle, or film container complies with the requirements of the plain feel doctrine. *Id.* at 93. After reviewing the relevant cases, the court concluded that the better reasoned view was that it did not: "if the object detected by the officers touched during a *Terry* search is a hard-shell, closed container, then the incriminating nature of any contents of that container cannot be immediately apparent to the officer until he seizes it and opens it. In such a situation, the officer cannot satisfy the *Dickerson* requirement that the officer have probable cause to believe, before seizing it, that the object is contraband." *Id.* at 94.

²⁹² See *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968); see also *Arizona v. Johnson*, 129 S. Ct. 781, 784 (2009) (holding that the first *Terry* requirement, a lawful investigative stop, is met whenever a police officer has the lawful authority to detain a car and its occupants for a traffic violation and that "police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity").

²⁹³ *Terry*, 392 U.S. at 24.

different justifications to stop and frisk an individual. He needs reasonable suspicion of criminal activity to stop the individual, and he needs reasonable suspicion that the individual is armed and dangerous in order to frisk him. The only time the officer's right to frisk flows automatically from the right to stop is when the officer has a reasonable suspicion that the individual is involved in a crime of violence.²⁹⁴

In several cases, the Court has conflated these two requirements. For example, in *Minnesota v. Dickerson*, the Court assumed that the officers had reason to suspect that Dickerson was involved in criminal activity *and* was armed and dangerous. The Court's conclusion that the officers had a reasonable suspicion that Dickerson was involved in criminal activity was not problematic. Dickerson had just left a notorious crack house and had tried to avoid the officers when he saw them.²⁹⁵ The officers could have reasonably concluded that these actions suggested Dickerson had just engaged in a drug transaction. However, it was a stretch to conclude that these same facts gave the officers reasonable suspicion that Dickerson was armed and dangerous unless one believes that all low-level drug users carry guns. Indeed, in an earlier case, the Court acknowledged that just because one associates with narcotics addicts does not mean one is armed and dangerous.²⁹⁶

In *Illinois v. Wardlow*, the Court again assumed the officers in question had both reasonable suspicion to stop *and* reasonable suspicion to frisk,²⁹⁷ when arguably all the officers had was reasonable suspicion to stop. In *Wardlow*, two uniformed officers in a police caravan patrolling a high crime neighborhood known for drug dealing spotted Wardlow standing next

²⁹⁴ *Id.* at 33 (Harlan, J., concurring).

²⁹⁵ *Minnesota v. Dickerson*, 508 U.S. 366, 368–69 (1993).

²⁹⁶ *Sibron v. New York*, 392 U.S. 40, 63–64 (1968). In finding the frisk in question unlawful, the *Sibron* Court noted, “The suspect’s mere act of talking with a number of known narcotics addicts over an eight hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime.” *Id.* at 64. Some lower courts have opined that drug dealers often carry weapons, supporting the view that reasonable suspicion that an individual is a drug dealer gives rise to reasonable suspicion that the individual is also armed and dangerous. *See, e.g., United States v. Salazar*, 945 F.2d 47, 51 (2d Cir. 1991). In *Dickerson*, however, the officers had no reason to suspect Dickerson was a drug dealer as opposed to merely a buyer or user of drugs. *See Stanley A. Goldman, To Flee or Not to Flee—That Is the Question: Flight as Furtive Gesture*, 37 IDAHO L. REV. 557, 575 (2001) (noting “[t]hat Mr. Dickerson was thus a drug suspect appears to be the only . . . basis for the officers’ belief that he was armed and posed a danger”); *see also David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 676 (1994) (noting that courts often “fail to distinguish between drug use or possession on the one hand and drug trafficking on the other for purposes of judging whether the defendant might be armed.”).

²⁹⁷ *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

to a building holding an opaque bag.²⁹⁸ Wardlow looked in the direction of the officers, then turned the other way and started to run.²⁹⁹ The officers chased Wardlow and when they caught up with him, one officer frisked him and found a gun in the bag he was holding.³⁰⁰ Wardlow was charged with unlawful use of a firearm by a convicted felon, and filed a motion to suppress the gun found during the stop and frisk.³⁰¹

Wardlow is usually cited for the proposition that flight from police officers alone is not sufficient for reasonable suspicion, but flight from police officers plus something else, like being in a high crime neighborhood, can give rise to a reasonable suspicion of criminal activity to stop an individual.³⁰² What is interesting about *Wardlow*, however, is the fact that the Court did not spend any appreciable time discussing whether the police officers who frisked Wardlow had the required reasonable suspicion to believe Wardlow was armed and dangerous. *Wardlow* was not a case where the officers had reason to suspect Wardlow of a crime of violence, so unless one subscribes to the view that wherever there are drugs, there are guns, the officers at most had reason to suspect Wardlow was involved in a drug crime, but no reason to suspect he was armed and dangerous.³⁰³

Moreover, in allowing the gun found in the bag Wardlow was holding to be admitted into evidence, the *Wardlow* decision suggested that a *Terry* frisk includes not just a limited pat-down of the outer clothing of the suspect, but also a search of any containers the suspect is carrying on his person.³⁰⁴ The Court in *Terry* never said that a frisk of the person includes a frisk of containers, but *Wardlow* implies that a frisk of the person includes

²⁹⁸ *Id.* at 121–22.

²⁹⁹ *Id.* at 122.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² See, e.g., *United States v. Brown*, 448 F.3d 239, 251 (3d Cir. 2006) (citing *Wardlow* for the proposition that a suspect's nervous, evasive behavior or flight from police alone may be insufficient to establish reasonable suspicion, but might corroborate an otherwise insufficient tip); *United States v. Bonner*, 363 F.3d 213, 217 (3d Cir. 2004) (citing *Wardlow* for the proposition that “flight upon noticing police, plus some other indicia of wrongdoing, can constitute reasonable suspicion”); *United States v. Scott*, 270 F.3d 30, 41 (1st Cir. 2001) (citing *Wardlow* in noting that “[a]n individual’s flight from police combined with other observations by a police officer may support reasonable suspicion sufficient for detention under *Terry*”).

³⁰³ The officer said he frisked Wardlow because in his experience, it was common for there to be weapons in the near vicinity of drug transactions. *Wardlow*, 528 U.S. at 122.

³⁰⁴ In reversing the judgment of the Illinois Supreme Court which had affirmed the trial court’s decision to suppress the gun, *Wardlow* could be read as approving the frisk of Wardlow. In a footnote, however, the *Wardlow* Court stated, “We express no opinion as to the lawfulness of the frisk independently of the stop.” *Id.* at 124 n.2.

a frisk of containers on the person. On the one hand, concern for officer safety supports allowing an officer who is patting down a suspect for weapons to search containers on the suspect's person that might contain a weapon. On the other hand, once the officer seizes the container and has it under his exclusive possession and control, the chance that the suspect will be able to access a weapon within the container is substantially diminished. This overlooked extension of the *Terry* stop and frisk doctrine in *Wardlow* brings the *Terry* doctrine closer to the search incident to arrest doctrine and its treatment of containers found either on or near the arrestee's person.³⁰⁵

4. *Terry* Frisks of the Car and Containers Within the Car

The *Terry* stop and frisk doctrine further undermines the Container Doctrine by allowing police officers to conduct warrantless searches of the passenger compartment of the car when they reasonably suspect that the individual stopped is dangerous and may gain access to a weapon in the car.³⁰⁶ In such a case, the officer may conduct a *Terry* frisk of the passenger compartment of the car for weapons.³⁰⁷ The *Terry* frisk of the car may include a search of any containers within the passenger compartment that might contain a weapon.³⁰⁸

E. ADMINISTRATIVE (A.K.A SPECIAL NEEDS) SEARCHES

Another way police officers may engage in warrantless container searches is through the administrative search exception, also known as the

³⁰⁵ When the Court upheld the warrantless search of a crumpled up cigarette package found in an arrestee's shirt pocket as a search incident to arrest in *United States v. Robinson*, Justice Marshall dissented, arguing that once the officer seized the cigarette package, the container was in his exclusive possession and control and there was no danger that the arrestee could gain access to a weapon or evidence within the package. 414 U.S. 218, 256 (1973) (Marshall, J., dissenting). Rejecting Justice Marshall's suggestion that the officer should have gotten a warrant before opening the package, the *Robinson* Court said that since Robinson was validly arrested, the officer had the right to conduct a full search of Robinson's person, including any packages or containers found on him. *Id.* at 236. Because Robinson had already been subjected to a full custodial arrest, any further intrusion into his privacy interests were minimal. *Id.* at 235. This rationale for allowing officers to conduct warrantless searches of containers found on an arrestee's person, however, does not apply when an officer finds a container on the person of an individual stopped on suspicion of criminal activity, but not arrested. The reason we allow officers to conduct stops and frisks upon less than probable cause is because the intrusion on privacy and liberty is supposedly much less than the intrusion on privacy and liberty when a person is arrested and taken into custody. *Id.* In suggesting that the frisk of *Wardlow* and the search of the paper bag he was holding was lawful, the *Wardlow* Court elided this distinction between stops and arrests.

³⁰⁶ *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

special needs exception.³⁰⁹ The administrative search exception is an umbrella exception which includes, *inter alia*, border searches, inventory searches, vehicle checkpoint searches, government employee searches, prisoner searches, and searches of high school students. It has been used to validate a high school principal's warrantless search of a student's purse,³¹⁰ the warrantless search of a government employee's office,³¹¹ and the warrantless search of a backpack found in a van impounded by a police officer.³¹²

Under the administrative search doctrine, the court first evaluates whether the government has a special need, above and beyond the normal need for law enforcement, to engage in the search.³¹³ If so, then the court balances the government's interests against the individual's interest in privacy, and decides whether the government's interests outweigh the individual's interest.³¹⁴ In its administrative search jurisprudence, the Court most clearly reflects its embrace of the Reasonableness view of the Fourth Amendment, for the ultimate inquiry in every administrative search case is whether the search is reasonable.³¹⁵ Critics of the special needs exception have pointed out that in virtually every case where the Court has found a special need, it has ruled in favor of the government, finding that the governmental interests outweighed the individual's interest.³¹⁶

³⁰⁹ For more detailed discussion of the Court's administrative search jurisprudence, see Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223 (2004) (arguing against an individualized suspicion requirement in the administrative search context); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 544–618 (1995) (arguing that individualized suspicion should be a component of reasonableness analysis even in administrative search cases); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553 (1992) (arguing that the Court should follow a contracts model in the special needs context, asking what kind of search rule the government and innocent targets would adopt if negotiating such a rule in advance).

³¹⁰ See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

³¹¹ See *O'Connor v. Ortega*, 480 U.S. 709 (1987).

³¹² See *Colorado v. Bertine*, 479 U.S. 367 (1987).

³¹³ Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 109 (noting that as a threshold inquiry, the Court asks whether special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable).

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ See, e.g., Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 551 (1997) ("In every case where the Court has found a special need and eschewed the requirements of a warrant and probable cause, it has concluded that the governmental interest outweighed the privacy interest . . ."); see also Arcila, *supra* note 309, at 1224 ("In

The administrative search exception was used to uphold checkpoints set up by the New York Police Department (NYPD) to search the containers of New York subway riders.³¹⁷ In response to a series of attacks on the London subway and bus systems in July 2005, the NYPD established a Container Inspection Program to deter terrorists from carrying explosives on to New York's subway system and to uncover any such attempts.³¹⁸ Under this program, the NYPD established container inspection checkpoints at selected subway facilities where uniformed officers would search the bags of a portion of individuals entering the subway station.³¹⁹

In *MacWade v. Kelly*, the Second Circuit upheld the constitutionality of NYPD's Container Inspection Program against a Fourth Amendment challenge.³²⁰ Subway riders represented by the New York Civil Liberties Union sued Raymond Kelly, commissioner of the NYPD, and the City of New York, arguing that NYPD's Container Inspection Program violated the Fourth and Fourteenth Amendments.³²¹ After a two-day bench trial, Judge

all but one of the Supreme Court's special needs cases, the Court has been deferential to governmental justifications"); Stuntz, *supra* note 309, at 554 (noting that the term "special need" is "no more than a label that indicates when a lax standard will apply.").

³¹⁷ See *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006).

³¹⁸ *Id.* at 264. A supervising sergeant established a selection rate, such as every fifth person, based on the number of officers available and the volume of passengers at that checkpoint. A large poster close to the table notified riders that "backpacks and other containers [are] subject to inspection." Announcements to the same effect were made in the subway station and on the trains. A supervising sergeant at the checkpoint used a bullhorn to tell subway passengers that all persons wishing to enter the station would be subject to a container search and to warn those wishing to avoid the search to leave the station. Officers assigned to these checkpoints were instructed to search only those containers capable of carrying an explosive device. Once an officer identified such a container, the officer was to limit his inspection to what was minimally necessary to ensure that the container did not contain an explosive device. Officers were instructed to not intentionally look for contraband other than explosives, but if an officer incidentally discovered such contraband, he could arrest the individual carrying it. Officers were told not to attempt to read any written or printed material. Additionally, officers were instructed not to record a passenger's personal information such as his or her name and address. Declining a search would not be grounds for an arrest, although police were authorized to arrest anyone who refused to be searched and later attempted to reenter the subway system with the uninspected container. *Id.* at 264–65. NYPD set up container inspection checkpoints at least thirty-five times a year in each of the city's 468 subway stations. Al Baker, *Subway Searches Go on Quietly, Just How Police Like Them*, N.Y. TIMES, July 6, 2007, at B1, available at <http://www.nytimes.com/2007/07/06/nyregion/06bags.html>.

³¹⁹ *MacWade*, 460 F.3d at 265. Although where the subway checkpoints were established seemed the result of random selection, the NYPD had reasons for selecting certain facilities over others, reasons which they kept secret to avoid letting potential terrorists know which subway stations would have checkpoints. *Id.* at 264.

³²⁰ *Id.* at 275.

³²¹ *Id.* at 263; see also *MacWade v. Kelly*, 05 Civ. 6921, 2005 U.S. Dist. LEXIS 31281, at *3 (S.D.N.Y. Dec. 2, 2005) (noting that plaintiffs were represented by the New York Civil

Richard Berman of the U.S. District Court for the Southern District of New York found the Container Inspection Program constitutional pursuant to the special needs exception and dismissed the complaint with prejudice.³²² The plaintiffs appealed.

Applying special needs analysis to the case at hand, the Second Circuit agreed with the district court's finding that the Container Inspection Program served the special need of preventing a terrorist attack on the subway.³²³ The court of appeals then balanced the government's interests against the subway riders' interests. Despite finding that subway riders have full, not diminished, expectations of privacy in their containers,³²⁴ the court found that given the substantial interest in preventing a terrorist attack on the subway, the Container Inspection Program was a reasonably effective means of addressing the government's interest in deterring and detecting a terrorist attack and intruded upon subway riders' privacy interests only to a minimal degree.³²⁵

MacWade builds on cases upholding warrantless searches of suitcases and other luggage at airports. Since the 1970s, lower courts have almost uniformly held that warrantless searches of luggage at airports are reasonable because of the government's interest in protecting the safety of airline passengers, a special need above and beyond the normal need for law enforcement.³²⁶

Liberties Union). Another lawsuit was filed against the NYPD in February 2009 by Jangir Sultan, a thirty-two-year-old native New Yorker of Kashmiri descent who was stopped and searched by police officers twenty-one times between July 2005, when the NYPD initiated the subway checkpoint program, and June 2008. *NYCLU Lawsuit Targets Racial Profiling at Subway Checkpoints*, NYCLU.ORG, Feb. 19, 2009, <http://www.nyclu.org/node/2252/print> (last visited 5/27/2009). The New York Civil Liberties Union, representing Sultan, alleged that Sultan's South Asian appearance was the only factor that could explain his persistent targeting by police officers. *Id.* The New York Civil Liberties Union also asserted that the checkpoint program's design invites racial profiling because officers are forbidden from recording any demographic information about the people selected. *Id.*

³²² *MacWade*, 460 F.3d at 263.

³²³ *Id.* at 270.

³²⁴ *Id.* at 272–73.

³²⁵ *Id.* at 275. *But see* Recent Case, *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006), 120 HARV. L. REV. 635 (2006) (arguing that in finding the subway checkpoint program constitutional after determining that subjects of searches enjoyed a full expectation of privacy in their containers, the Second Circuit diminished the role of the individual's interest in privacy in the special needs analysis, making it easier for future courts to find other warrantless searches constitutional under the special needs doctrine).

³²⁶ *United States v. Edwards*, 498 F.2d 496, 500–01 (2d Cir. 1974) (upholding FAA regulations permitting the use of metal detectors to search carry-on baggage at airports); *United States v. Cyzewski*, 484 F.2d 509, 512 (5th Cir. 1973) (“The courts have consistently held airport security measures constitutionally justified as a limited and relatively insignificant intrusion of privacy balanced against the need to protect aircraft and its

While most people are familiar with the searches of luggage that routinely take place at our nation's airports, few know that government officials are now conducting warrantless, suspicionless searches of laptops belonging to international travelers. Since July 2008, the Department of Homeland Security has permitted federal agents at the border or its functional equivalent to seize electronic devices capable of storing information in digital or analog form, such as laptop computers, cell phones, iPods, pagers, and beepers, without a warrant for an unspecified period of time.³²⁷ Federal agents may copy data within these devices without a warrant or any particularized suspicion of wrongdoing.³²⁸ The contents of a laptop may be shared with other agencies and private entities for language translation or data decryption.³²⁹ Between October 2008 and June 2010, more than 6,000 travelers have had their laptops searched under this policy.³³⁰

Permitting warrantless, suspicionless searches of laptops is inconsistent with the Container Doctrine's insistence that law enforcement officers obtain judicial authorization before searching a container. It is also a departure from previous rules that recognized the special needs involved in policing the border, but required probable cause to believe a crime had been or was being committed before federal agents could copy material that a traveler was bringing into the country.³³¹ Nonetheless, at least one federal

passengers."); *United States v. Davis*, 482 F.2d 893, 910 (9th Cir. 1973) (upholding warrantless search of briefcase at airport given the "unquestionably grave and urgent" need to prevent airline hijacking).

³²⁷ Ellen Nakashima, *Expanded Powers to Search Travelers at Border Detailed*, WASH. POST, Sept. 23, 2008, at A2 (discussing U.S. CUSTOMS AND BORDER PROTECTION POLICY REGARDING BORDER SEARCH OF INFORMATION (July 16, 2008); U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, BORDER SEARCHES OF DOCUMENTS AND ELECTRONIC MEDIA, Directive No. 7-6.0 (July 16, 2008)).

³²⁸ *Id.*

³²⁹ Ellen Nakashima, *Travelers' Laptops May Be Detained at Border*, WASH. POST, Aug. 1, 2008, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/08/01/AR20080080103030_pf.html.

³³⁰ Ellen Nakashima, *New Lawsuit to Challenge Laptop Searches at U.S. Border*, WASH. POST, Sept. 7, 2010, at A4, available at <http://www.washingtonpost.com/wpdyn/content/article/2010/09/07/AR2010090700845.html>.

³³¹ Nakashima, *supra* note 327, at A1. Laptop computers often contain highly sensitive personal information, including financial and medical information. If one uses a laptop to surf the internet, a history of websites visited may be revealed during a search. See Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 543 (2005) (noting that browsers used to surf the World Wide Web are typically programmed to automatically retain information about websites users have visited in recent weeks and that users can use this history to retrace their steps or find webpages previously visited); Editorial, *Search and Replace: Congress Needs to Set the Rules for How Border Agents Can Delve into Travelers' Laptops*, WASH. POST, Aug. 13, 2008, at A14, available at <http://www.washingtonpost.com>

circuit court of appeals has upheld a warrantless, suspicionless search of a laptop under the border search doctrine, rejecting the argument that laptops, like homes, are repositories of highly personal information.³³² Whether laptop computers and other electronic devices should be treated like traditional portable containers is a question that has divided the lower courts.³³³

wp-dyn/content/article/2008/08/12/AF200808120202744-pf.html. While the governmental need to protect the safety of the nation against the threat of terrorism is a weighty one, it is not clear that allowing federal agents to search all laptops at the border without any reason to suspect that the laptop owner is engaging in or has engaged in terrorism or criminal activity is necessary or appropriate in light of the significant intrusion on privacy interests that such searches entail.

³³² See *United States v. Arnold*, 533 F.3d 1003, 1009 (9th Cir. 2008) (“Arnold’s analogy to a search of a home based on a laptop’s storage capacity is without merit.”); see also *United States v. Ickes*, 393 F.3d 501, 506 (4th Cir. 2005) (refusing to recognize a First Amendment exception to the border search doctrine in cases involving laptops). But see Christine A. Coletta, Note, *Laptop Searches at the United States Borders and the Border Search Exception to the Fourth Amendment*, 48 B.C. L. REV. 971 (2007) (arguing that laptop searches at the border should be predicated by reasonable suspicion); Ari B. Fontecchio, Note, *Suspicionless Laptop Searches Under the Border Search Doctrine: The Fourth Amendment Exception that Swallows Your Laptop*, 31 CARDOZO L. REV. 231 (2009) (arguing that suspicionless laptop searches at the border compromise border security by diverting attention from the more important task of preventing the entry of weapons); Marianne Leach, Note, *Fliers Beware: The Ninth Circuit Decision, United States v. Arnold, Granted Customs Agents Access Into Your Laptops*, 26 T.M. COOLEY L. REV. 307 (2009) (arguing that reasonable suspicion should be required before government officials search laptops at the border). In September 2010, the ACLU filed a lawsuit against the Department of Homeland Security, arguing that its laptop search policy violates the Fourth Amendment. Press Release, ACLU, *Abidor v. Napolitano: The ACLU Challenges Suspicionless Laptop Border Policy* (Sept. 15, 2010), available at <http://www.aclu.org/free-speech-technology-and-liberty/abidor-v-napolitano>; Nakashima, *supra* note 330.

³³³ See, e.g., *People v. Emerson*, 766 N.Y.S.2d 482, 487, 490 (Sup. Ct. 2003) (treating computers and computer files as closed containers); *United States v. Barth*, 26 F. Supp. 2d 929, 936–37 (W.D. Tex. 1998) (“[T]he Fourth Amendment protection of closed computer files and hard drives is similar to the protection it affords a person’s closed containers.”); *United States v. David*, 756 F. Supp. 1385, 1391 (D. Nev. 1991) (treating handheld computer memo book as a container). But see *United States v. Simpson*, 152 F.3d 1241, 1248 (10th Cir. 1998) (rejecting defendant’s argument that his computer disks and hard drive were the equivalent of closed containers, and therefore absent exigent circumstances, the government needed a search warrant to search his computer); see also Thomas K. Clancy, *The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and a Primer*, 75 MISS. L.J. 193, 195 (2005) (arguing that computers are containers and that computer searches should be treated just like other container searches). The government’s laptop search policy in essence treats laptop computers like containers that are routinely searched at airports.

F. INVENTORY SEARCHES

Another way law enforcement officials can search a container without a warrant is through an inventory search. When an officer takes a person or vehicle into custody, police department regulations may authorize the officer to take an inventory of property taken from the individual or vehicle. Those regulations may allow the officer to open closed containers so that the contents of the containers can be inventoried. While inventory searches are a type of administrative search, I discuss them separately because the Court has specified a set of criteria that must be met for an inventory search to be valid, which differs from the usual special needs plus balancing inquiry that is conducted in most administrative search cases.

In order for an inventory search to be valid, the officer (1) must have been acting in accordance with standardized criteria,³³⁴ and (2) must not have acted in bad faith, i.e., for the sole purpose of searching for evidence of criminal wrongdoing.³³⁵ The inventory or recording of items taken is done to protect the individual's property from theft and to protect the police against false claims of lost or stolen property.³³⁶ The Court has made clear that under this exception, police may search containers found on an individual's person³³⁷ or in a motor vehicle³³⁸ as long as the search is conducted in accordance with standardized inventory procedures.

In *Colorado v. Bertine*, the Court rejected an argument that the Container Doctrine applied to invalidate the warrantless search of a backpack found in a van during an inventory of the van.³³⁹ The Court distinguished this case from *Chadwick* and *Sanders* on the ground that in those cases, the search was solely for the purpose of investigating criminal

³³⁴ *Colorado v. Bertine*, 479 U.S. 367, 374–75 (1987). In *Florida v. Wells*, the Court noted that while the requirement of standardized criteria is intended to limit the discretion of the inventorying officer, it is not intended to strip police officers of all discretion. 495 U.S. 1, 4 (1990) (invalidating search of locked suitcase found in trunk of car during inventory search where highway patrol had no policy with regard to whether closed containers encountered during an inventory search could be opened). In the Court's view, a police officer may be given discretion "to determine whether a container should or should not be opened in light of the nature of the search and characteristics of the container itself." *Id.* "Thus, while policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors." *Id.* at 607.

³³⁵ *Bertine*, 479 U.S. at 372. *But see* *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (holding subjective motivations of police officer irrelevant to lawfulness of inventory search).

³³⁶ *Bertine*, 479 U.S. at 371–72.

³³⁷ *Illinois v. Lafayette*, 462 U.S. 640 (1983) (shoulder bag defendant was carrying).

³³⁸ *Bertine*, 479 U.S. at 739 (backpack in defendant's van).

³³⁹ *Id.*

activity while in this case, the officer was just inventorying the contents of the van he was impounding.³⁴⁰

G. EXIGENT CIRCUMSTANCES

Warrantless container searches are also permitted under what is called the exigent circumstances exception. This exception to the warrant requirement is somewhat of a catch-all, permitting police to conduct warrantless searches whenever an emergency situation exists. The precise requirements of the exigent circumstances exception are not hard and fast, but generally, the police must be dealing with an emergency situation that makes obtaining a warrant impracticable and the officer conducting the search must have probable cause to believe evidence of a crime will be found in the place searched.³⁴¹ Additionally, the emergency that justifies the police action limits the appropriate scope of the search.³⁴² Thus, if police reasonably believe that stolen shotguns are being stored in a shed and about to be moved, they may only search places or containers within the shed that might contain a shotgun.

Even when it established the Container Doctrine, the Court recognized that a warrant would not be required if police were dealing with an emergency situation in which lives would be lost, individuals harmed, or evidence destroyed if they took the time required to obtain a warrant before conducting the search.³⁴³ Lower courts have authorized warrantless searches of containers under the exigent circumstances exception when police reasonably believed the container at issue contained explosives.³⁴⁴ Additionally, under what is known as the emergency aid doctrine,³⁴⁵ courts

³⁴⁰ *Id.*

³⁴¹ 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 179–80 (5th ed. 2010).

³⁴² *Id.* at 179.

³⁴³ See *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (“In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority.”).

³⁴⁴ *United States v. Pace*, 898 F.2d 1218, 1229 (7th Cir. 1990) (finding warrantless search of suitcase in trunk permissible under the exigent circumstances exception to the warrant requirement because officer had probable cause to believe suitcase could contain explosives).

³⁴⁵ Under the emergency aid doctrine, which is different from the exigent circumstances exception, police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

have permitted warrantless searches of containers when the search was reasonably believed necessary to assist an unconscious or injured person.³⁴⁶

H. REOPENING A CONTAINER AFTER A PRIOR LAWFUL OPENING

In 1983, the Court eroded the Container Doctrine even further when it held that a search of a container after a prior lawful opening and controlled delivery does not require a warrant.³⁴⁷ A controlled delivery typically occurs

when a carrier, usually an airline, unexpectedly discovers what seems to be contraband while inspecting luggage to learn the identity of its owner, or when the contraband falls out of a broken or damaged piece of luggage, or when the carrier exercises its inspection privilege because some suspicious circumstance has caused it concern that it may unwittingly be transporting contraband.³⁴⁸

After such a discovery, law enforcement agents frequently “restore the contraband to its container, then close or reseal the container, and authorize the carrier to deliver it to its owner.”³⁴⁹ When the owner takes delivery, he is arrested.³⁵⁰ In *Illinois v. Andreas*, the Court held that there is no legitimate expectation of privacy in the contents of a sealed container previously opened under lawful authority and that a warrant is not required to re-open the container absent a substantial likelihood that the contents have been changed.³⁵¹

V. FROM WARRANT PREFERENCE TO REASONABLENESS WITH TEETH

The gradual erosion of the Container Doctrine and the Court’s corresponding shift from warrants to reasonableness is problematic for many reasons. The shift reflects the Court’s preference for ex post reasonableness review over ex ante judicial review through the warrant process. Ex post reasonableness review is not necessarily bad, but is highly deferential as currently applied, operating as a rubber stamp of approval in favor of the challenged governmental action.³⁵² Additionally, because the

³⁴⁶ *United States v. Black*, 860 F.2d 1080 (6th Cir. 1988) (holding that a warrantless search of unconscious individual’s purse for identification or medication was reasonable given the emergency situation at hand); *United States v. Dunavan*, 485 F.2d 201 (6th Cir. 1973) (holding that a warrantless search of locked briefcase for identification of individual found unconscious and foaming at the mouth was permissible to deal with the emergency).

³⁴⁷ *Illinois v. Andreas*, 463 U.S. 765, 773 (1983).

³⁴⁸ *Id.* at 770.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.* at 773.

³⁵² See Colb, *supra* note 38, at 1687–88 (noting that in cases where the Court applies reasonableness balancing, it applies a “relaxed and deferential approach to the balancing at

Court has failed to define reasonableness in the Fourth Amendment context, reasonableness remains a vague and amorphous standard that provides little guidance to police officers, attorneys, and lower courts.

Less obviously, the erosion of the Container Doctrine disproportionately harms poor people, and by implication poor people of color.³⁵³ As William Stuntz has observed, by protecting privacy expectations, the Fourth Amendment protects those with more privacy to begin with, which generally means wealthier individuals who can afford to live in nice homes.³⁵⁴ For various reasons, the poor are more likely than the wealthy to be found outside the home and on the street where they and their portable containers are more susceptible to being searched without a warrant.³⁵⁵

Allowing police officers to search containers without a warrant also undermines the concerns that originally motivated the Court to establish the Container Doctrine: protecting the heightened expectations of privacy that attend to the contents of portable containers and ensuring that the probable cause determination is made by a neutral and detached judicial officer, rather than a police officer. Given the numerous exceptions to the warrant requirement that enable police officers to search containers without a warrant, portable containers no longer enjoy their previous privileged status at the top of the spectrum of Fourth Amendment protection.³⁵⁶

In requiring police officers to obtain a warrant prior to searching a container, the Court situated itself squarely on the side of warrants when it established the Container Doctrine. While the Container Doctrine's warrant requirement seems at odds with the reasonableness view of the Fourth Amendment, it may be possible to accommodate both the concerns that

hand"); Maclin, *supra* note 16, at 199 (arguing that Fourth Amendment questions tend to be resolved using a test that approximates the deferential rational basis test).

³⁵³ See *infra* text accompanying notes 335–356.

³⁵⁴ William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266–67 (1999).

³⁵⁵ See *supra* Part IV.A.2. for a discussion of how the erosion of the Container Doctrine disproportionately hurts the poor.

³⁵⁶ While some of these exceptions, such as the search incident to arrest and consent doctrines, also apply in the home, many of the exceptions that enable police to search containers without a warrant do not apply to containers in homes. For example, the automobile exception and the *Terry* stop and frisk doctrine do not apply to searches in the home. *Terry* searches and auto searches typically occur on the street. See *Terry v. Ohio*, 392 U.S. 1, 4 (1968) (“This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.”); *California v. Carney*, 471 U.S. 386, 403 (1985) (“The automobile exception has been developed to ameliorate the practical problems associated with the search of vehicles that have been stopped on the streets or public highways because there was probable cause to believe they were transporting contraband.”).

originally animated the Container Doctrine and the Court's current preference for an open-ended reasonableness standard over a more precise warrant requirement. I suggest below that the Court may be able to accommodate these two seemingly divergent interests by embracing a more rigorous type of reasonableness review, which I call reasonableness with teeth. To support my proposal, I look outside the criminal procedure arena and borrow from a small slice of the Court's equal protection jurisprudence. Drawing lessons from several equal protection cases in which the Supreme Court utilized a less deferential than usual rational basis review—what some have called “rational basis with bite”—to strike down legislation which discriminated against a politically unpopular group, I propose that courts similarly engage in more rigorous review—reasonableness *with teeth*—when deciding the constitutionality of warrantless container searches. Before explaining the concept of reasonableness with teeth, I explain why the erosion of the Container Doctrine should be of concern to anyone interested in maintaining a robust Fourth Amendment.

A. WHY THE EROSION OF THE CONTAINER DOCTRINE IS
PROBLEMATIC

1. Problems with Normal Reasonableness Review

As explained in Part III, the erosion of the Container Doctrine has largely tracked the Court's movement away from warrants and its embrace of reasonableness as the central meaning of the Fourth Amendment. Instead of insisting that police officers obtain a warrant before engaging in a search unless an exception to the warrant requirement applies, the Court allows police officers to search first, subject to later judicial review for reasonableness.

When courts engage in reasonableness review, they tend to balance the individual's interests in privacy and dignity against the government's interests.³⁵⁷ The ultimate inquiry is whether the search was reasonable given all the circumstances. Reasonableness review offers the advantage of flexibility and attention to context. Because reasonableness is an open-ended concept, courts utilizing reasonableness review may, in theory, take into account any and all circumstances that might be relevant. In practice, however, courts engaging in reasonableness review tend to focus primarily

³⁵⁷ Balancing tests are not without their critics. Alexander Aleinikoff identifies serious problems with balancing tests in general. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). Wayne Holly critiques the Court's reasonableness balancing methodology for “fail[ing] to account for the difference between a ‘right’ guaranteed by the Constitution and an individual or government's mere ‘interest’ in achieving a particular goal.” Holly, *supra* note 21, at 556–57.

on two factors: the government's interest in conducting the search and the individual's interest in privacy. At a time when Americans seem increasingly willing to trade privacy for convenience (think of the amount of personal information people are willing to put on Facebook),³⁵⁸ balancing these two interests is likely to result in more intrusive governmental activity given decreasing expectations of privacy.

a. The Traditional Critique of Reasonableness

While balancing with an eye to reasonableness appears to be a fair way to determine whether someone's Fourth Amendment rights have been violated, it is not fair when the Supreme Court balances with its thumb on the scale in favor of the government.³⁵⁹ Rather than being neutral, Fourth Amendment reasonableness review tends to be highly deferential to the government. So deferential that Tracey Maclin and other legal scholars often compare Fourth Amendment reasonableness review to rational basis review in the equal protection context.³⁶⁰ Just as courts engaging in equal protection rational basis review will invalidate social and economic legislation only if there is absolutely no rational explanation, real or imagined, for the legislation, courts engaging in Fourth Amendment reasonableness review will invalidate a search or seizure "only when the police act irrationally."³⁶¹ If the reviewing court "can identify any plausible goal or reason that promotes law enforcement interests,"³⁶² the challenged

³⁵⁸ See Dan Fletcher, *Friends Without Borders*, TIME, May 31, 2010, at 32, 32–35 (noting that 500 million people subscribe to Facebook and that with 48 billion unique images, Facebook houses the world's largest photo collection); see also Monica Hesse, *Status Symbol: Look at Facebook Now*, WASH. POST, July 23, 2010, at A1 (arguing that either Facebook has ruined our concept of privacy or privacy is an outdated construct).

³⁵⁹ See Davies, note 145, at 3–6 (arguing that two factors account for the Rehnquist Court's tendency to defer to the government in Fourth Amendment cases: (1) the composition of the Court, and (2) the fact that the Justices refuse to be bound by constitutional doctrine and principles). The Court itself has acknowledged that in cases where it finds probable cause, it does not actually balance but almost always finds in favor of the government. See *Whren v. United States*, 517 U.S. 806, 817–18 (1996) (noting that while in principle, every Fourth Amendment case involves a balancing of all relevant factors to determine reasonableness, in practice, where probable cause is found, the only cases where the Court actually balances is when searches or seizures are conducted in an extraordinary manner).

³⁶⁰ Maclin, *supra* note 16, at 199 ("Fourth Amendment questions are resolved using a test that approximates the rational basis standard, which is the test used to decide equal protection and due process challenges to social and economic legislation."); see also Stuntz, *supra* note 309, at 554 ("The Supreme Court's generalized 'reasonableness' standard resembles not negligence, but rational basis constitutional review: when the standard applies, the government wins, save perhaps for a few egregious cases.").

³⁶¹ Maclin, *supra* note 16, at 200.

³⁶² *Id.*

police conduct will be considered reasonable and not in violation of the Fourth Amendment. While it may make sense to defer to the government when the court is reviewing social and economic legislation that does not impact a suspect class or fundamental right, reasonableness review in the Fourth Amendment context should not be deferential given the concerns about government overreaching that animated our founding fathers to include the Fourth Amendment in the Bill of Rights.³⁶³ The judiciary should not abdicate its responsibility of checking the executive when a fundamental right is at issue.

A second problem with reasonableness review is the lack of guidance that the Court has provided to lower courts deciding the validity of searches under a generalized reasonableness standard. Instead of a bright-line rule, the reasonableness approach allows reviewing courts to decide whether a search was lawful without any benchmarks to guide them in this difficult decision. This lack of guidance is particularly striking given that the Court has on numerous occasions spoken of the importance of having bright-line rules in the Fourth Amendment context to guide police officers who often need to make quick, on-the-spot decisions in the field.³⁶⁴ In the hustle and bustle of daily trial practice, trial courts also have to make quick decisions. An abstract reasonableness standard provides little guidance to help them make such decisions.³⁶⁵

b. The Critique of Reasonableness from the Left

Beyond the traditional critique of reasonableness, both feminist theory and critical race theory offer additional insights. First, in purporting to be neutral and objective, a reasonableness standard can mask the fact that what the law considers reasonable is often just what those in positions of authority consider to be reasonable.³⁶⁶ As Dana Raigrodski notes, “[R]easonableness and common sense have always been assigned a race (white), a gender (male), and a class (wealthy).”³⁶⁷

³⁶³ *Id.* at 201 (arguing that the central meaning of the Fourth Amendment is distrust of police power and discretion).

³⁶⁴ *See, e.g.*, *California v. Acevedo*, 500 U.S. 565, 579 (1991); *New York v. Belton*, 453 U.S. 454, 458 (1981); *United States v. Robinson*, 414 U.S. 218, 236 (1973). For a critique of the Court’s embrace of bright line rules in its Fourth Amendment jurisprudence, see Alschuler, *supra* note 37.

³⁶⁵ I thank Jenny Roberts for this observation.

³⁶⁶ Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153 (2008).

³⁶⁷ *Id.* at 187. For an excellent analysis of the *Wardlow* Court’s failure to acknowledge the race, gender, and class implications of the case, see *id.* at 185–88.

Moreover, most reasonableness standards assume “some transcendent, universal knowledge, independent from and uninfluenced by the observer.”³⁶⁸ But as feminist scholars and race critics have long argued, gender, race, sexual orientation, and class, among other things, can influence not only the way one experiences life, but also the way one perceives the world.³⁶⁹

In a piercingly thoughtful analysis of the *Florida v. Bostick* decision,³⁷⁰ Devon Carbado explains how Justice O’Connor’s color-blind ideology allowed her to ignore the influence that race could have had on the question whether the defendant was “seized” by police.³⁷¹ The test for a seizure of the person at that time was whether a *reasonable* person in the defendant’s shoes would have felt free to leave.³⁷²

In *Florida v. Bostick*, two uniformed police officers boarded a bus bound from Miami to Atlanta.³⁷³ Without any particularized reason to think that Terrance Bostick, a young African-American male, was carrying drugs, the officers asked Bostick to show identification and consent to a search of

³⁶⁸ *Id.* at 185; see also Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1210–15 (1990) (providing an insightful critique of the “Reasonable Man” standard used in tort law).

³⁶⁹ See John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2144 (1992) (noting that because the worlds of blacks and whites have been intensely separate since slavery, it is “no surprise that blacks and whites so often see quite different realities at both the perceptual and experiential levels”); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 572 (1984) (“The uniformity of life experience of the inner circle of writers [a handful of white, male law professors] may color not only the way they conceptualize and frame problems of race, but also the solutions or remedies they devise.”); Camille A. Nelson, *Lyrical Assault: Dancehall versus the Cultural Imperialism of the North-West*, 17 S. CAL. INTERDISC. L.J. 231, 263 (2008) (arguing that sexual orientation, gender, class and race can influence whether and how one perceives threats to one’s person); Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1138, 1141 (2007) (noting that “race deeply affects the perceptions, experiences, consciousness, and opportunities of all Blacks, regardless of their ancestry and class status,” while arguing that ancestral heritage, including whether a Black student descended from slaves in the United States, should also play a role in the implementation of affirmative action policies); Raigrodski, *supra* note 366, at 185; see also Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 723–24 (1992) (“Life experiences and personal perspective often influence how one envisions the substance and function of the Constitution and the Bill of Rights.”).

³⁷⁰ *Florida v. Bostick*, 501 U.S. 429 (1991).

³⁷¹ Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

³⁷² *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

³⁷³ *Bostick*, 501 U.S. at 431.

his luggage.³⁷⁴ Bostick claimed he did not consent to a search of his luggage, but the officers thought Bostick consented, so they opened his suitcase and found cocaine within.³⁷⁵ Bostick was arrested and charged with trafficking in cocaine.³⁷⁶ Before trial, Bostick moved to suppress the cocaine found in his suitcase, arguing that it was seized in violation of the Fourth Amendment.³⁷⁷

While Justice O'Connor, who wrote the majority opinion, does not decide whether Bostick was seized within the meaning of the Fourth Amendment, she suggests that the encounter between Bostick and the officers on the bus was consensual and that a reasonable person in Bostick's shoes would have felt free to leave.³⁷⁸ Justice O'Connor is able to draw the conclusion that a reasonable person in Bostick's shoes would have felt free to leave or terminate the encounter with the officer only by ignoring Bostick's race. As Carbado explains:

Nowhere in Justice O'Connor's opinion does she entertain the possibility that Bostick may have been targeted because he is black. In fact, Justice O'Connor does not even mention Bostick's race. Nor does she mention the race of the officers. In this sense, an argument can be made that Justice O'Connor's analysis ignores race. This argument, however, is only partially correct. That is, while it is fair to say that Justice O'Connor's analysis ignores the fact that Bostick is black and the officers are white, it is more accurate to say that her analysis constructs Bostick and the officers with the racial ideology of colorblindness. In other words, the problem is not that Justice O'Connor does not see race, but rather that she sees race in a particular way. Her decision to see Bostick as a man and not as a black man does not ignore race; it constructs race.³⁷⁹

Carbado explains why Justice O'Connor's failure to acknowledge race in this case is relevant:

The interaction of black male identity with white male police authority creates a physically confining social situation every bit as real as (and operating independently from) being on a bus. Most, if not all, black people—especially black men—are apprehensive about police encounters. They grow up with racial stories of police

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 431–32 (“[T]here is a conflict in the evidence about whether the defendant consented to the search.”).

³⁷⁶ *Id.* at 432.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 437 (“The facts of this case . . . leave some doubt whether a seizure occurred Nevertheless, we refrain from deciding whether or not a seizure occurred in this case.”). The test for a seizure of the person is whether the reasonable person in the defendant's shoes would have felt free to leave or terminate the encounter with the police. *See* *United States v. Mendenhall*, 446 U.S. 544 (1980) (establishing the “free to leave” test for seizures of the person); *Bostick*, 501 U.S. at 429 (modifying test for a seizure when the reason the individual might not feel free to leave is not due to coercive actions of the police).

³⁷⁹ Carbado, *supra* note 371, at 977–78.

abuse—witnessing them as public spectacles in the media, observing them firsthand in their communities, and experiencing them as daily realities. Put another way, race-based policing is part of black people’s collective consciousness. Thus, when black people encounter the police, “[t]hey don’t know whether justice will be meted out or whether judge, jury and executioner is pulling up behind them.” Yet, Justice O’Connor situates her seizure analysis outside of this racial reality. She removes Bostick and the police officers from a social context in which race is material to a discursive, socially constructed world in which it is not. At no time does Justice O’Connor consider how Bostick, or a man in his racial position, might have experienced two white police officers crowded around him on a bus. She race neutralizes the encounter. Bostick’s race, the race of the officers, and the relationship between the two receive no textual engagement in her analysis. Thus, her opinion fails to consider that Bostick may have been the target of a particular racial preference.³⁸⁰

Similarly, Anthony Thompson provides a racial critique of the *Terry v. Ohio* decision, which held that a stop and frisk of two black men and their white companion was reasonable.³⁸¹ Thompson points out that Chief Justice Warren, writing the majority opinion in *Terry*, recounted the facts of the case in entirely race-neutral terms, never revealing that Terry and one of his companions were black and that Terry’s other companion and Detective McFadden were white.³⁸² Thompson points out that only when one considers race does Detective McFadden’s assertion—that he couldn’t say precisely what drew his attention to the defendants and that he just didn’t like them—make sense.³⁸³

The problematic nature of open-ended reasonableness standards has led many feminist scholars to argue in favor of more subjective standards over purportedly objective ones.³⁸⁴ In the self-defense context, for

³⁸⁰ *Id.* at 985 (internal quotation deleted).

³⁸¹ Thompson, *supra* note 256, at 969 (arguing that the Court created a “police officer as expert” narrative to justify the stop and frisk); see also Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 214–15 (1994) (critiquing the presumption that police officers usually act from good motives).

³⁸² Thompson, *supra* note 256, at 964.

³⁸³ *Id.* at 966 (“When one adds the missing racial element to the Court’s statement of facts, certain otherwise inexplicable events suddenly become much more comprehensible. Detective McFadden’s assertion that ‘he was unable to say precisely what first drew his eye to [Terry and Chilton],’ an assertion accepted by the trial court and uncritically recited by the Supreme Court, assumes a new meaning when one views *Terry* as a case in which a white detective noticed—and then focused his attention on—two black men who were doing nothing more than standing on a street corner in downtown Cleveland in the middle of the afternoon.”).

³⁸⁴ See, e.g., CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* (2000); see also Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOYOLA L.A. L. REV. 435 (1981). But see Naomi R. Cahn, *The*

example, some feminist scholars have argued that battered women who kill their abusers in non-confrontational situations should not be held to the usual reasonable person standard, but instead should be compared to the average battered woman.³⁸⁵ In response to the feminist critique of reasonableness, some courts have openly embraced a reasonable woman standard in cases involving female defendants claiming self-defense.³⁸⁶ Some courts have embraced a reasonable woman standard in the sexual harassment arena as well.³⁸⁷ In the Fourth Amendment context, Dana Raigrodski urges the Court to abandon reasonableness standards altogether and instead embrace the values of anti-subordination and empowerment.³⁸⁸

While I agree with the concerns raised by my fellow feminist and critical race colleagues, I do not see the Court jettisoning reasonableness as the cornerstone of its Fourth Amendment jurisprudence anytime soon. Moreover, even if it wanted to, the Court could not abandon reasonableness as a requirement for a valid search or seizure. The text of the Fourth Amendment includes an explicit command that searches and seizures not be unreasonable.³⁸⁹ Given these considerations, my proposal for reform works

Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice, 77 CORNELL L. REV. 1398 (1992) (illustrating problems with a reasonable woman standard).

³⁸⁵ See, e.g., Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 415 (1988) ("Given that courts consider at least some of the particular defendant's attributes and circumstances in defining the 'reasonable person,' they should likewise present an instruction that directs the jury to measure the defendant's actions against those of the 'reasonable battered woman.'"); see also Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man*, 16 BUFF. WOMEN'S L.J. 65, 77 (2008) (arguing that the reasonable person standard should be defined so as to "adopt all of the characteristics of the individual on trial"). But see Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 444-45 (1991) (rejecting adoption of a reasonable battered woman standard); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 566 (1992) ("There is no single 'reasonable woman,' and I worry about the ways that adoption of a separate standard for battered women in particular or women in general will penalize women's different experiences and women's departures from a stereotypical norm.").

³⁸⁶ See, e.g., *State v. Wanrow*, 559 P.2d 548 (Wash. 1977) (reversing female defendant's murder conviction in part because jury was instructed to measure her beliefs and actions against that of a reasonable man in the same circumstances when they should have taken into account her gender in deciding her claim of self-defense). Some courts have held that in cases involving battered women claiming self-defense, evidence of battered woman syndrome is relevant to the reasonableness determination. See, e.g., *State v. Stewart*, 763 P.2d 572, 646 (Kan. 1988) ("In cases involving battered spouses, expert evidence of the battered woman syndrome is relevant to a determination of the reasonableness of the defendant's perception of danger.").

³⁸⁷ See, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

³⁸⁸ Raigrodski, *supra* note 366, at 214-15.

³⁸⁹ U.S. CONST. amend. IV.

within the reasonableness framework that the Court has openly embraced. Even though reasonableness review to date has tended to result in rulings favoring the government, there is no reason why reasonableness review has to be deferential, pro-government, or anti-progressive.

2. *How the Erosion of the Container Doctrine Harms the Homeless and the Urban Poor*

One underappreciated ramification of the erosion of the Container Doctrine is its impact on the homeless and the urban poor, and its corresponding impact on poor people of color living in the inner city.³⁹⁰ As Lenese Herbert notes, “[T]he police in high-crime neighborhoods often violate the [Fourth Amendment’s] strictures and regularly reach inside (and often empty) pockets, bags, hats, purses, and other effects without having sufficient suspicion that the stopped individuals are armed.”³⁹¹

The confluence of several factors contributes to this state of affairs. First, police do most of their policing in poor, high crime neighborhoods.³⁹² Second, the homeless and the urban poor spend more time outside their homes and on the street where they are more vulnerable to being stopped and searched.³⁹³

Because police tend to focus their crime-fighting activities in poor urban neighborhoods,³⁹⁴ one is more likely to be stopped and searched if one lives in a low income, high crime neighborhood than if one lives in a more affluent area. If the search uncovers incriminating evidence, that search is likely to be upheld as lawful. This is because lower courts deciding whether police had the requisite reasonable suspicion to stop and frisk an individual tend to give enormous weight to the location where the

³⁹⁰ Here, I borrow from William Stuntz’s definition of the “poor.” Stuntz explains, “[B]y ‘poor’ or ‘lower-class’ or ‘downscale’ communities, I mean communities in which unemployment is high, legally acquired wealth and income are low, and educational and social resources are below par.” William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1801 (1998).

³⁹¹ Lenese C. Herbert, *Can’t You See What I’m Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL’Y 135, 137 (2002).

³⁹² Cynthia Hujar Orr, *Meet Marcel Johnson*, CHAMPION, Apr. 2010, at 14 (“It is a reality that the police more heavily patrol poor urban neighborhoods where the majority of the population is Latino or Black.”).

³⁹³ See *infra* text accompanying notes 403–410.

³⁹⁴ See Orr, *supra* note 392, at 14 (noting that police more heavily patrol poor urban neighborhoods); see also Russell L. Weaver, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277, 282 (2010) (noting that police are more likely to conduct surveillance in poor urban neighborhoods populated by racial minorities).

stop took place.³⁹⁵ If the stop takes place in a “high crime” or “high drug activity” area, little else is necessary for the court to find the requisite reasonable suspicion.³⁹⁶

Many poor people of color live in high crime neighborhoods. This does not mean that poor racial minorities are more likely than others to engage in criminal activity. As I. Bennett Capers observes, “Crime tends to be high in minority neighborhoods not because of the presence of minorities, but largely because the neighborhoods themselves tend to be criminogenic due to disproportionate lack of educational opportunities, jobs, services, and concern.”³⁹⁷ Many poor people of color live in high crime neighborhoods because they cannot afford to live in better neighborhoods. Unfortunately, location often serves as “a proxy for race or ethnicity.”³⁹⁸ As Lewis Katz notes, “By sanctioning investigative stops on little more than the area in which the stop takes place, the phrase ‘high crime area’ has the effect of criminalizing race.”³⁹⁹

One study found that stops and frisks by New York City police officers were disproportionately concentrated in the city’s poorest neighborhoods, which also happened to be the neighborhoods with the highest concentrations of racial minorities.⁴⁰⁰ The study also found that poor persons of color were more likely than white individuals to be stopped, questioned, searched and arrested by police.⁴⁰¹ David Harris explains why blacks and Latinos living in poor, high crime neighborhoods tend to receive disproportionate police scrutiny:

In many courts an individual’s presence in a high crime location plus evasion of the police equals suspicion reasonable enough to allow a stop under *Terry*. African Americans, Hispanic Americans, and poor people are likely to find themselves in such high crime areas, simply because they live and work there. If these people choose to avoid the police—a choice they have the constitutional right to make—the police may stop them. If the location is not just a high crime area but a location known for drug activity, the police may go further: They may search the individual, performing a *Terry* pat-down. In other words, every person who works or lives in a high crime area

³⁹⁵ Katz, *supra* note 256, at 493 (“Consequently, lower courts give enormous weight to this collateral factor, often requiring little more than some other innocuous bits of information to fulfill the reasonable suspicion requirement justifying a stop. Thus, ‘high crime area’ becomes a centerpiece of the *Terry* analysis, serving almost as a talismanic signal justifying investigative stops.”).

³⁹⁶ *Id.*

³⁹⁷ I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 49 (2009).

³⁹⁸ Katz, *supra* note 256, at 493.

³⁹⁹ *Id.*

⁴⁰⁰ Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 477 (2007).

⁴⁰¹ *Id.* at 458.

and who avoids the police is subject to automatic seizure, and to automatic search if the crime suspected involves drugs. Due to the disproportionately high number of African Americans and Hispanic Americans living in those areas, they are subject to this treatment much more often than are whites.⁴⁰²

A second reason why the erosion of the Container Doctrine disproportionately affects the urban poor and the homeless has to do with the Court's focus on protecting reasonable expectations of privacy as the primary purpose of the Fourth Amendment. With privacy at the core of Fourth Amendment protections, one's activities in the privacy of one's home will be more protected than one's activities on the street. As William Stuntz observes, by focusing on privacy as the primary interest protected by the Fourth Amendment, the Court favors those who already have more privacy to begin with.⁴⁰³ Those with more money can usually afford to live in detached single family dwellings in the suburbs with lots of space between their home and the next-door neighbor's home.⁴⁰⁴ Those with less money often live in crowded, multi-tenant apartment buildings or public housing.⁴⁰⁵

Despite the usual rule that police need a warrant in order to search a home, police can search a home shared by multiple tenants without a warrant if one of the co-tenants consents to the search. Under the Court's third-party consent jurisprudence, not only can police search a home without a warrant upon receiving consent of a third party with actual

⁴⁰² Harris, *supra* note 296, at 680–81.

⁴⁰³ Stuntz, *supra* note 354, at 1266–67.

⁴⁰⁴ *Id.* at 1270 (“People with more money are more likely to live in detached houses with yards; people with less money are more likely to live in apartment buildings with common hallways.”); *see also* SUDHIR ALLADI VENKATESH, OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR 89 (2006) (noting that “[i]n suburban and middle- and upper-income communities, the boundaries between the home and the outside world can be maintained intact,” whereas in poor urban neighborhoods, “private space is at a premium, if not a luxury”). That wealthy people tend to live in detached houses may not be the case in all cities. For example, many affluent individuals in Washington, D.C. choose to live in Georgetown, Capitol Hill, or Dupont Circle where million dollar homes are often rowhouses which share adjoining walls. However, wealthy people rarely live in crowded multi-tenant apartment buildings.

⁴⁰⁵ Stuntz, *supra* note 354, at 1270. Carrie Leonetti observes that lower courts tend to treat the common areas of an apartment building, including the hallways, as open fields, which means police can enter these areas without a warrant or any justification. Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 GEO. MASON U. C.R. L.J. 297 (2005) (arguing that lower courts should treat the hallway area just outside a tenant's apartment as curtilage, not open fields). Police sometimes engage in warrantless, suspicionless searches of residents of public housing. *See* Adam Carlis, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2002 (2009) (“[R]ecent years have brought systematic, suspicionless searches of [public housing] residents' homes.”).

authority, i.e., mutual use of the property or joint access or control,⁴⁰⁶ but police can also search the home without a warrant even if it turns out the person does not in fact have the requisite actual authority.⁴⁰⁷ As long as a reviewing court finds that the officer's belief was reasonable, the consent will be deemed valid.⁴⁰⁸

The Fourth Amendment provides even less protection for the homes of the homeless. Lower courts routinely hold that homeless persons lack a reasonable expectation of privacy in their homes when that home is a cardboard box or some other fixture on public property, either because the homeless person cannot claim an ownership interest in the property or because his home is open to public view.⁴⁰⁹

If one has a nice home, one is likely to spend time relaxing or entertaining within one's home. If one lives in a crowded, noisy, multi-tenant apartment building, or in a place with little privacy like a shelter, one is more likely to spend time relaxing or visiting friends outside the home.⁴¹⁰ Sudhir Alladi Venkatesh studied the lives of the urban poor and found that

⁴⁰⁶ *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974) ("The authority which justifies the third-party consent does not rest upon the law of property . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes . . .").

⁴⁰⁷ *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

⁴⁰⁸ *Id.*

⁴⁰⁹ See, e.g., *United States v. Ruckman*, 806 F.2d 1471, 1472–73 (10th Cir. 1986) (finding that homeless man did not have a reasonable expectation of privacy in cave on government land where he lived); *State v. Mooney*, 588 A.2d 145, 152 (Conn. 1991) (finding that homeless person lacked a reasonable expectation of privacy in area under public bridge where he slept and kept his personal belongings); *People v. Thomas*, 45 Cal. Rptr. 2d 610, 613 (Ct. App. 1995) (finding that homeless person residing in cardboard box on public sidewalk in violation of city ordinance lacked a reasonable expectation of privacy in his home); *State v. Cleator*, 857 P. 2d 306, 309 (Wash. Ct. App. 1993) (finding no reasonable expectation of privacy in tent unlawfully erected on public property); see also David H. Steinberg, *Constructing Homes for the Homeless? Searching for a Fourth Amendment Standard*, 41 DUKE L.J. 1508, 1538 (1992) (supporting the holding in *Mooney* on the ground that Mooney, who lacked any positive entitlement to the land on which he lived, had no reasonable expectation of privacy in that land). But see *United States v. Sandoval*, 200 F.3d 659, 660–61 (9th Cir. 2000) (finding reasonable expectation of privacy in tent erected on government property). Little has been written on whether the Fourth Amendment applies to protect the belongings of individuals in homeless shelters against warrantless searches. See Steven R. Morrison, *The Fourth Amendment's Applicability to Residents of Homeless Shelters*, 32 HAMLINE L. REV. 319, 321 (2009) ("[O]nly a handful of opinions have dealt with the Fourth Amendment's applicability [to] homeless shelters.").

⁴¹⁰ Stuntz, *supra* note 354, at 1272 ("It is poor people in cities who tend to live in large apartment buildings, to travel by bus or subway, and because of a combination of income and concentrated population, to spend more time on the street than do people in other places."); see also VENKATESH, *supra* note 404, at 172 ("People are pushed outside by overcrowding, families' 'doubling up' to pay rent, and the generally inhospitable condition of apartments.").

“[w]hat some might see as a mass of Americans lying about, and out of work, is in many cases an ensemble of persons who lack private places where they can rest.”⁴¹¹ William Stuntz observes that it is common to see people in poor urban neighborhoods hanging out on the street at all hours of the night and day because sitting on one’s front stoop or wandering the streets and talking to neighbors is less costly than other forms of entertainment.⁴¹²

Encounters between the police and individuals on the street are much more common than searches within the home that generally require a warrant.⁴¹³ On the street, police do not need a warrant to stop and question individuals or engage in a host of investigative activity that can culminate in the search of a portable container.⁴¹⁴ For example, on the street, an officer can walk up to an individual and question him for any reason or no reason at all as long as a reasonable person in the individual’s shoes would feel free to leave.⁴¹⁵ Of course, the average person would not feel free to leave if an officer stopped him or her and started asking questions.⁴¹⁶ Nonetheless, in numerous cases the Court has declined to find that a seizure of the person occurred under facts strongly suggesting that the average person in the defendant’s shoes would not have felt free to leave.⁴¹⁷

⁴¹¹ VENKATESH, *supra* note 404, at 172; *see also* SUDHIR ALLADI VENKATESH, *GANG LEADER FOR A DAY: A ROGUE SOCIOLOGIST TAKES TO THE STREETS* (2008) (describing the life of a gang leader and other individuals living in a public housing project in Chicago).

⁴¹² Stuntz, *supra* note 354, at 1271.

⁴¹³ William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1062 (1995) (“[T]here are many, many more street encounters than searches of homes.”).

⁴¹⁴ Stuntz, *supra* note 354, at 1271 (“Fourth Amendment law makes it easy for police to stop and search pedestrians.”).

⁴¹⁵ *United States v. Drayton*, 536 U.S. 194, 209 (2002) (Souter, J., dissenting) (“A perfect example of police conduct that supports no colorable claim of seizure is the act of an officer who simply goes up to a pedestrian on the street and asks him a question.”); *Florida v. Royer*, 460 U.S. 491, 497 (1983) (“[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence . . . his voluntary answers to such questions.”).

⁴¹⁶ In the first empirical study of its kind, David Kessler surveyed 406 randomly selected Boston residents and found that most would not feel free to terminate an encounter with police, even with knowledge of the right to leave. David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment’s Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 74–78 (2009). Kessler also found that women and young people under the age of twenty-five would feel even less free to leave than men and adults over the age of twenty-five. *Id.* at 75.

⁴¹⁷ *See, e.g., Drayton*, 536 U.S. at 197–99, 203 (finding no seizure of bus passengers where three plainclothes officers with visible badges and concealed weapons boarded bus and one officer knelt on driver’s seat and faced the rear while the other two officers walked

On the street, an officer with very little justification—the Court calls it reasonable suspicion—can briefly detain an individual and perform a pat-down frisk of the person’s outer clothing in a search for weapons.⁴¹⁸ As noted in Part III, even though the officer is supposed to have a reason to suspect the individual is armed and dangerous prior to conducting the frisk, courts often assume that reasonable suspicion of criminal activity gives rise to a reasonable suspicion that the suspect is armed and dangerous.⁴¹⁹ If the officer comes across a container on the suspect during the frisk, he may open that container without a warrant and it is likely that a court will uphold his warrantless search.⁴²⁰

On the street, a police officer does not need a warrant to arrest an individual as long as the officer has probable cause to believe that a crime has been committed and that the arrestee committed it.⁴²¹ Once the officer arrests the individual, he can conduct a full search of the arrestee’s person.⁴²² Incident to arrest, he can search any containers on the arrestee’s person⁴²³ or within the arrestee’s wingspan.⁴²⁴

In the workplace, the focus on reasonable expectations of privacy means the Fourth Amendment protects the interests of white-collar workers more than blue-collar workers. If police want to search an enclosed private office, ordinarily they must obtain a search warrant based on probable cause.⁴²⁵ People who work in factories, on assembly lines, on shop floors,

to the rear of the bus and began asking passengers questions); *INS v. Delgado*, 466 U.S. 210 (1984) (finding no seizure of factory workers where INS agents moved through factory to question workers regarding their immigration status while other INS agents stood near the exits); *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (finding no seizure where defendant was approached by DEA agents while walking through airport concourse, asked to show identification and airline ticket, asked why the name on the ticket did not match the name on the driver’s license, and asked to accompany the agents to the airport DEA office for further questions after her driver’s license and airline ticket were returned to her).

⁴¹⁸ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁴¹⁹ See *infra* text accompanying notes 292–303.

⁴²⁰ See *infra* Part IV.D.2 and IV.D.3 (discussing *Minnesota v. Dickerson* and *Illinois v. Wardlow*).

⁴²¹ *United States v. Watson*, 423 U.S. 411 (1976).

⁴²² *United States v. Robinson*, 414 U.S. 218 (1973).

⁴²³ *Id.*

⁴²⁴ *Id.*; *Chimel v. California*, 395 U.S. 752 (1969).

⁴²⁵ Stuntz, *supra* note 354, at 1270. If an individual works for the government, however, his or her office might be searched without a warrant if a court finds that the governmental interests outweigh the individual’s privacy interests. *O’Connor v. Ortega*, 480 U.S. 709, 719–20 (1987) (plurality opinion) (“In the case of searches conducted by a public employer, we must balance the invasion of the employees’ legitimate expectations of privacy against the government’s need for supervision, control, and the efficient operation of the workplace.”). Without deciding whether the search before it was reasonable, the *O’Connor* Court held that “public employer intrusions on the constitutionally protected privacy

or in hotel kitchens, however, usually do not have offices, so the police can often enter and observe their workplaces without a warrant.⁴²⁶

One might think that when it comes to cars, the Fourth Amendment treats wealthy and poor drivers alike. Regardless of whether you are wealthy or poor, a police officer can search your car without a warrant as long as the officer has probable cause to believe there is evidence of a crime within the car. As Stuntz notes, “[O]ne can enjoy as much, or as little, privacy in an old Chevrolet as in a new Lexus.”⁴²⁷ Even though all drivers, in theory, are treated alike, in reality, black and Latino drivers are stopped at rates greatly disproportionate to their numbers in the community, and their cars are more often searched than the cars of white drivers.⁴²⁸ Moreover, the urban poor and middle class often use public transportation instead of cars,⁴²⁹ possibly because of the high cost of parking downtown. The Fourth Amendment generally treats passengers on subways and buses just like pedestrians on the street.⁴³⁰

Since poor and homeless people tend to conduct most of their activity on the street, they and the portable containers they carry are more likely to be searched without a warrant than individuals and containers that stay within the four walls of a home. Importantly, it is not just poor and homeless criminals who are affected by the erosion of protection for containers on the street. Poor and homeless individuals who lead law-abiding lives are also more likely to have their expectations of privacy intruded upon than more wealthy individuals who spend less of their time on the street.

interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.” *Id.* at 725–26. In other words, a government employer might not need a search warrant to search a government employee’s office.

⁴²⁶ Stuntz, *supra* note 354, at 1271.

⁴²⁷ *Id.*

⁴²⁸ DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 79–80 (2002) (noting that during 1995 and 1996, blacks, who constituted only 17% of all drivers, made up 70% of drivers who were stopped and searched by Maryland State Police and that in 2000, black and Latino drivers constituted 78% of all drivers on the southern end of the New Jersey turnpike who were stopped and searched by New Jersey State Police); David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 560 (1997); *see also* Capers, *supra* note 397, at 67 (noting that a recent study of police stops in two predominantly white suburban communities found that African-American drivers had license plate query rates that were 325% and 383% greater than those of the general driver population).

⁴²⁹ Stuntz, *supra* note 354, at 1271.

⁴³⁰ *Id.*

B. BORROWING FROM THE COURT'S EQUAL PROTECTION
JURISPRUDENCE

Under the Supreme Court's equal protection jurisprudence, if a law burdens a fundamental right or targets a suspect class, such as race, alienage, or national origin, the reviewing court must apply strict scrutiny review, striking down the legislation unless it is narrowly tailored to serve a compelling governmental interest.⁴³¹ If legislation discriminates on the basis of gender, the reviewing court will apply heightened or intermediate scrutiny, striking down the legislation if it fails to substantially further an important governmental purpose.⁴³² If a law does not burden a fundamental right or target a suspect or quasi-suspect classification, the Court will uphold the legislation as long as the classification bears "a rational relation to some legitimate end."⁴³³

In most cases, the level of scrutiny employed effectively predetermines whether the legislation will be struck down as constitutionally infirm or upheld. If strict or intermediate scrutiny applies, the legislation will almost always be struck down, leading Gerald Gunther to remark that strict scrutiny review is "'strict' in theory and fatal in fact."⁴³⁴ On the other hand, if rational basis review is the applicable standard, the challenged legislation will almost always be upheld.⁴³⁵ When a court applies rational basis

⁴³¹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

⁴³² *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–24 (1982) (noting that when a statute classifies individuals on the basis of gender, the party seeking to uphold the statute must show "that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'"); *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."). A classification based on illegitimacy, which is considered a quasi-suspect classification, is also subject to heightened review. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting that intermediate scrutiny has been applied to discriminatory classifications based on illegitimacy); *Mills v. Habluetzel*, 456 U.S. 91, 98–99 (1982) (noting that restrictions based on illegitimacy "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest"). *But see* *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (refusing to apply heightened scrutiny to classification based on age).

⁴³³ *Romer v. Evans*, 517 U.S. 620, 631 (1996); *see also City of Cleburne*, 473 U.S. at 440 ("The general rule is that [such] legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

⁴³⁴ Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

⁴³⁵ *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 304 (1997) ("The rational basis test is extremely permissive, and in the case of economic or social legislation has traditionally led to almost automatic approval."); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term*

review, it gives the legislature wide latitude because it is presumed that even improvident or unwise social or economic legislation will eventually be corrected through the democratic process.⁴³⁶

In three rare cases, which Cass Sunstein calls the “*Moreno-Cleburne-Romer* Triology,” the Supreme Court struck down legislation that discriminated against politically unpopular groups using rational basis review that looked more like heightened scrutiny.⁴³⁷ In *Moreno*, *Cleburne*, and *Romer*, the Court did not do what it usually does when it applies rational basis review. Instead of rubber-stamping the legislation in question, the Court scrutinized the reasons provided by the State, discredited the State’s purported motives, and struck down the legislation on the ground that it was not supported by a legitimate governmental interest.⁴³⁸ As others have put it, the Court applied “rational basis with bite.”⁴³⁹

The *Moreno-Cleburne-Romer* trilogy involved legislation that harmed a group the Court considered politically unpopular, but not suspect or quasi-suspect. The legislation in *Moreno*, which barred individuals who lived in households with at least one unrelated person from obtaining food stamps, was aimed at preventing hippies from being eligible for food stamps.⁴⁴⁰ The legislation in *Cleburne* made it harder for group homes for people with

Through Romer v. Evans, 32 IND. L. REV. 357, 357 (1999) (noting that rationality review is “ordinarily deferential and minimal”).

⁴³⁶ *City of Cleburne*, 473 U.S. at 440.

⁴³⁷ Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 59, 61 (1996). Robert Farrell notes that the Court has struck down social and economic legislation using rational basis with bite on several other occasions. Farrell, *supra* note 435, at 357 (claiming that between 1971 and 1996, the Court decided ten successful rational basis claims while rejecting rational basis arguments in one hundred cases).

⁴³⁸ See Sunstein, *supra* note 437, at 59–63.

⁴³⁹ See, e.g., Bhagwat, *supra* note 435, at 327 (noting that *Moreno*, *Cleburne*, and *Romer* have been categorized as cases applying “rational basis review with bite”); Gunther, *supra* note 434, at 18–19 (noting that in seven of the fifteen basic equal protection decisions in the 1971 term, “the Court upheld the [equal protection] claim or remanded it for consideration without mentioning the ‘strict scrutiny’ formula,” thus finding “bite in the equal protection cases after explicitly voicing the traditionally toothless minimal scrutiny standard”); see also Gayle Lynne Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779 (1987) (critiquing the Supreme Court’s use of rational basis review with bite and arguing that this type of review is just intermediate scrutiny in disguise); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769 (2005) (arguing that the Court’s failure to articulate the factors triggering rational basis with bite review has led to confusion in the lower courts).

⁴⁴⁰ *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 530, 534–35 (1973).

mental disabilities to meet certain zoning requirements.⁴⁴¹ The legislation in *Romer* treated gays and lesbians differently than heterosexuals by prohibiting any legislative, executive, or judicial action designed to protect gays and lesbians from discrimination.⁴⁴² Underlying each of these cases was the belief that the majoritarian democratic process would not correct legislation that disadvantaged a politically unpopular group.

Not requiring police to get a warrant before searching a portable container, the net effect of the erosion of the Container Doctrine, also disproportionately harms two politically powerless groups—the homeless and the urban poor.⁴⁴³ Borrowing from the Court’s rational basis with bite jurisprudence, I suggest that when the government claims that an exception to the warrant requirement justifies a warrantless search of a container, in addition to deciding whether the requirements of the exception have been satisfied, the reviewing court should conduct a non-deferential inquiry into the overall reasonableness of the search. In other words, just as the Court has applied rational basis review *with bite* when social and economic

⁴⁴¹ *City of Cleburne*, 473 U.S. at 436–37. For an insightful analysis of the *Cleburne* decision, see Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.–C.L. L. REV. 111, 113–40 (1987).

⁴⁴² *Romer v. Evans*, 517 U.S. 620, 624 (1996).

⁴⁴³ See Ann M. Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211, 273–75 (2003) (discussing the legal and practical obstacles that prevent or discourage the poor and the homeless from voting). The erosion of the Container Doctrine also harms another group—those caught with contraband or evidence of a crime in their portable containers who become criminal defendants. Many scholars have argued that criminal defendants are a politically unpopular or disfavored group. See generally Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993) (arguing that legislatures undervalue the rights of the accused); Adam M. Gershowitz, *Imposing a Gap on Capital Punishment*, 72 MO. L. REV. 73, 116–17 (2007) (arguing that the unpopularity of criminal defendants make them the quintessential discrete and insular minority); Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 594 (2005) (arguing that criminal defendants are an unpopular group); David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1290 (2002) (noting that criminal defendants as a group are “peculiarly powerless to protect themselves through the normal processes of majoritarian democracy.”); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 20–21 (1996) (arguing that criminal suspects as a group find it hard or impossible to protect themselves through the political process). But see Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599 (2004) (arguing that the federalization of crime exposes politically prominent individuals, including members of Congress, to the criminal justice system and thus ensures that lawmakers will not be wholly antagonistic to criminal defendants).

legislation harms a politically unpopular group, the Court should apply reasonableness review *with teeth* to warrantless container searches.⁴⁴⁴

At first glance, rational basis review in the equal protection context seems conceptually distinct from the reasonableness of a search or seizure in the Fourth Amendment context. Rational basis review focuses on whether there is a legitimate reason for a particular piece of legislation. Reasonableness review, in contrast, balances individual versus governmental interests to decide the propriety of a governmental intrusion on privacy. Comparing the two, however, is useful because both standards typically accord great deference to the government. In its equal protection jurisprudence, the Court has recognized that rational basis review does not always have to be deferential to the government. I suggest that non-deferential review is even more appropriate in the Fourth Amendment context given the desire to check executive discretion that led the Framers to include the Fourth Amendment in the Bill of Rights.

Reasonableness with teeth offers the advantage of flexibility and attention to context that constitutes one of the strengths of regular reasonableness review. At the same time, reasonableness with teeth is better than normal reasonableness review because it is less deferential to the government. An anti-deference rule is particularly important in the Fourth Amendment context given the original concerns that motivated the Framers to include the Fourth Amendment in the Bill of Rights. The Fourth Amendment was intended to act as a check on executive discretion. More searching judicial review of police search decisions comports with the original understanding of the Fourth Amendment.

Moreover, reasonableness with teeth can and should be more determinate than normal reasonableness review. By spelling out the factors that lower courts should take into consideration when deciding whether a given search passes constitutional muster under reasonableness with teeth, the Court can provide guidance to lower courts and litigants as to when a particular search passes constitutional muster.

One might object to my proposal on the ground that in the *Moreno-Cleburne-Evans* trilogy, the Court was dealing with legislation it felt was motivated by animus toward a politically unpopular group whereas in the container search cases, there is no legislation designed to disadvantage the homeless or the urban poor. The ability to search containers without a warrant comes from judicial opinions, not legislation, and the

⁴⁴⁴ The ease with which police officers can obtain search warrants suggests non-deferential reasonableness review might be appropriate even in cases where the police obtained a search warrant. See Bascuas, *supra* note 28, at 580 (arguing that a search warrant “offers little if any protection against government invasions of private property and serves primarily to obviate adversarial challenge”).

disproportionate effect that the erosion of the Container Doctrine has on the homeless and urban poor is simply the unhappy by-product not of animus, but of court decisions favoring reasonableness over warrants. There is little evidence to suggest that law enforcement officers who search containers are intentionally targeting the homeless and the poor. The Court's jurisprudence on container searches simply happens to have the unfortunate side effect of disproportionately burdening a politically unpopular group.

I have several responses to this objection. First, the fact that the Court in *Moreno-Cleburne-Romer* trilogy was reviewing legislation whereas courts reviewing container searches are reviewing police decisions to search is a distinction without a difference, at least in this context. In both instances, a branch of the government—the legislature in the equal protection arena and the executive in the Fourth Amendment context—is acting in a way that disproportionately hurts a politically unpopular group. Because the political process is unlikely to correct itself when non-majoritarian interests are disadvantaged, extra safeguards must be implemented to protect the harmed group when it is a politically unpopular minority. Moreover, one reason for judicial deference to legislatures under the usual rational basis test is because *legislatures* enjoy a strong presumption of legitimacy.⁴⁴⁵ Given the history of overreaching which led the Framers to adopt the Fourth Amendment, courts should not presume legitimacy when it comes to *police* decisions to search.⁴⁴⁶

Second, the fact that the *Moreno-Cleburne-Romer* trilogy dealt with legislative acts that appeared to intentionally discriminate against a politically unpopular group does not mean reasonableness review with teeth cannot be applied in the container search context where there is no evidence that courts or police officers are intentionally discriminating against the homeless and the poor. The discriminatory intent requirement in equal protection jurisprudence has been heavily criticized as misguided in light of overwhelming social science research showing that much of the discrimination that takes place today is the result of implicit bias, not overt intentional discrimination.⁴⁴⁷

⁴⁴⁵ *Romer*, 517 U.S. at 632.

⁴⁴⁶ See Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *TOURO L. REV.* 93, 143 (2007) (arguing that a court should strictly scrutinize searches and seizures involving excessive executive discretion or the lack of legislative authorization, which is the case in the run-of-the-mill police search).

⁴⁴⁷ See Jerry Kang, *Trojan Horses of Race*, 118 *HARV. L. REV.* 1489, 1506–08 (2005); Jerry Kang & Mazharin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 *CAL. L. REV.* 1063, 1064 (2006); Cynthia Lee, *The Gay Panic Defense*, 42 *U.C. DAVIS L. REV.* 471, 536–41 (2008) (discussing recent social science research on race and implicit bias). See generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment*

In the container search context, we may not have a government actor or institution that is *intentionally* targeting a politically unpopular group, but that is beside the point. Even if there is no animus or intent to discriminate, favoring the containers of the wealthy over the containers of the poor at best reflects indifference; at worst, it indicates a callous disregard for the rights of the less wealthy and less fortunate. In a society that prides itself on equal application of the law, we should strive to ensure that Fourth Amendment protections do not skew in favor of the wealthy over the poor. Ensuring equal protection of the rich and poor here is especially important because the Fourth Amendment right to be free from unreasonable searches and seizures is explicitly protected by the Constitution.

A second possible objection to non-deferential reasonableness review of warrantless container searches might be that the Court has explicitly refused to recognize the poor as a suspect class.⁴⁴⁸ Heightened review, this argument would continue, is only merited when a suspect or quasi-suspect class is affected by the challenged governmental action. This is a weak objection, given that the Court similarly refused to recognize hippies, the mentally disabled, and gays and lesbians as suspect classes in *Moreno*, *Cleburne*, and *Romer*, yet applied non-deferential review in these cases.⁴⁴⁹

Moreover, support for a heightened standard of review in container search cases can be found in other equal protection cases in which the Court struck down legislation that disproportionately burdened the poor. Notably, in each of these cases, the Court did not require proof of intent to discriminate against the poor. Moreover, unlike in the container search cases where the poor are burdened in the exercise of an explicit constitutional right—the right to be free from unreasonable searches and seizures—the challenged legislation in each of these cases harmed the poor in the exercise of rights not explicitly in the Constitution.⁴⁵⁰

Opportunity, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁴⁴⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (noting that the poor are not a suspect class because they are “not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”).

⁴⁴⁹ *Romer*, 517 U.S. at 624; *City of Cleburne v. Cleburne Living Ctr.*, 47 U.S. 432, 436–37 (1985); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 530, 534–35 (1973).

⁴⁵⁰ *See, e.g.*, *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665–66 (1966) (right to vote in state elections not explicitly in the U.S. Constitution); *Shapiro v. Thompson*, 394 U.S. 618, 630–31 (1969) (right to travel from state to state not explicitly in the Constitution), *overruled on other grounds by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

For example, in *Harper v. Virginia Board of Elections*, the Court struck down Virginia's poll tax on equal protection grounds.⁴⁵¹ Section 173 of the Virginia Constitution directed the General Assembly to levy an annual poll tax not exceeding \$1.50 on every resident twenty-one years or older.⁴⁵² Section 18 of the Virginia Constitution made payment of poll taxes a precondition for voting in state elections.⁴⁵³ Even though there is no explicit constitutional right to vote in state elections,⁴⁵⁴ the Court found Virginia's poll tax violative of equal protection because it discriminated against the poor in the exercise of their right of suffrage.⁴⁵⁵

Similarly, in *Shapiro v. Thompson*, the Court struck down statutory provisions denying welfare benefits to indigents who had not resided in the state for at least one year on equal protection grounds.⁴⁵⁶ The Court held the durational residency provisions unconstitutional because they infringed on the poor's exercise of their constitutional right to travel.⁴⁵⁷ The Court acknowledged that the Constitution contains no explicit right to travel, but suggested such a right is implied in the Privileges and Immunities Clauses.⁴⁵⁸

I am not the first legal scholar to suggest that the Court should borrow from its equal protection jurisprudence when deciding whether the Fourth Amendment has been violated. Scott Sundby has argued that the Court's reasonableness balancing test should be replaced with a strict scrutiny standard to reorient the Fourth Amendment back toward protecting privacy interests.⁴⁵⁹ To reconcile the tension between the Warrant Preference and

⁴⁵¹ *Harper*, 383 U.S. at 666.

⁴⁵² *Id.* at 664 n.1.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at 665.

⁴⁵⁵ *Id.* at 668 (“[T]he interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.”).

⁴⁵⁶ *Shapiro v. Thompson*, 394 U.S. 618 (1969), *overruled on other grounds by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

⁴⁵⁷ *Id.* at 627.

⁴⁵⁸ *Id.* at 630 n.8.

⁴⁵⁹ Sundby, *supra* note 20, at 431 (“[T]he soundest alternative to the Court’s current vague balancing test is a single-tiered strict scrutiny standard based on a compelling government interest-least intrusive means test.”); *see also* Holly, *supra* note 21, at 340–41 (arguing that the current reasonableness balancing approach to the Fourth Amendment should be abandoned and that the Court should return to the warrant requirement and examine warrantless searches with strict scrutiny); Kevin C. Newsom, Recent Development, *Suspicionless Drug Testing and the Fourth Amendment: Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995), 19 HARV. J.L. & PUB. POL’Y 209, 213 (1995) (arguing that the Court should “replace its freewheeling ‘reasonableness’ analysis with the familiar standard of strict scrutiny in evaluating government searches”); Nadine Strossen, *The Fourth*

the Separate Clauses views, Sundby proposes a composite model of the Fourth Amendment under which initiatory intrusions—intrusions in which the government initiates the investigative activity in the absence of any suspicious behavior—are evaluated for reasonableness and responsive or investigatory intrusions—where the government investigation is based upon particularized suspicion—are analyzed under the warrant clause.⁴⁶⁰ Under Sundby's proposal, an initiatory intrusion should be deemed reasonable only if there is a compelling governmental interest and the intrusion is the least intrusive means to achieve that governmental interest.⁴⁶¹ Sundby argues that a strict scrutiny standard for initiatory intrusions would provide a more structured reasonableness inquiry than the current balancing test.⁴⁶² Under Sundby's proposal, an investigatory intrusion would require a warrant based on probable cause.⁴⁶³

Another leading Fourth Amendment scholar, Christopher Slobogin, has argued that "Fourth Amendment analysis should mimic equal protection rationality review 'with bite,' if not strict scrutiny."⁴⁶⁴ Unlike Sundby who finds *Terry* problematic, Slobogin thinks the Court in *Terry* got it right by adjusting the amount of justification needed (reasonable suspicion rather than probable cause) to account for the level of intrusiveness of the seizure (a brief, investigatory detention rather than a prolonged arrest). Slobogin argues that *Terry*'s sliding scale approach should be extended to all searches and seizures such that courts evaluating the reasonableness of a

Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis, 63 N.Y.U. L. REV. 1173, 1189 (1988) (arguing for a least intrusive means analysis to inform the reasonableness balancing analysis because "alleged violations of fourth amendment rights should . . . be subjected to judicial scrutiny which is at least as strict as that applied to alleged violations of other constitutional rights"). Additionally, Robert Logan argues that the Court should utilize a variation of its equal protection three-tiered standard of review model when it analyzes its special needs cases. Robert S. Logan, *The Reverse Equal Protection Analysis: A New Methodology for "Special Needs" Cases*, 68 GEO. WASH. L. REV. 447 (2000). A few student authors have argued that the Court should apply intermediate scrutiny in certain Fourth Amendment contexts. See, e.g., John P. Cronan, Note, *Subjecting the Fourth Amendment to Intermediate Scrutiny: The Reasonableness of Media Ride-Alongs*, 17 YALE L. & POL'Y REV. 949, 959 (1999) (arguing for intermediate scrutiny of media ride-alongs); John S. Morgan, Comment, *The Junking of the Fourth Amendment: Illinois v. Krull and New York v. Burger*, 63 TUL. L. REV. 335, 371 (1988) (arguing for intermediate scrutiny of searches of closely regulated businesses).

⁴⁶⁰ Sundby, *supra* note 20, at 418–19.

⁴⁶¹ *Id.* at 431.

⁴⁶² *Id.*

⁴⁶³ *Id.* at 418–19.

⁴⁶⁴ Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053, 1089 (1998).

search or seizure “should demand from the government a specific showing of need that is proportionate to the invasion.”⁴⁶⁵

Over the years, various Supreme Court Justices have expressed support for a sliding scale approach as well. In 1949, for example, Justice Robert Jackson, dissenting in *Brinegar v. United States*, argued that if a child were kidnapped, the police would be justified in setting up a roadblock and searching every outgoing car without probable cause, even if they would not be justified in implementing such a roadblock to catch a bootlegger.⁴⁶⁶ More recently, in 2000, Justice O’Connor, writing for the Court in *City of Indianapolis v. Edmond*, echoed Justice Jackson’s sentiments, suggesting that the validity of a roadblock might turn on the purpose for which the roadblock was created:

[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or catch a dangerous criminal who is likely to flee by a particular route. The exigencies created by these scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction.⁴⁶⁷

Also in 2000, Justice Ginsburg, writing for the majority in *Florida v. J.L.*, suggested that a sliding scale approach to reasonable suspicion might be appropriate:

The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports and schools, cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.⁴⁶⁸

In his famous Oliver Wendell Holmes lectures on the Fourth Amendment, Anthony Amsterdam pointed out that the Supreme Court has already adopted a sliding scale approach in two contexts:

⁴⁶⁵ *Id.*; see also CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* (2007) (arguing that the Fourth Amendment should be read to permit only those surveillance techniques that produce a success rate roughly proportionate to the intrusion they visit upon those affected and that intrusiveness should be measured empirically); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 68–75 (1991).

⁴⁶⁶ *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).

⁴⁶⁷ *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

⁴⁶⁸ *Florida v. J.L.*, 529 U.S. 266, 273–74 (2000) (citations omitted).

In two cases the Supreme Court has taken just such a sliding scale approach. The first is *Terry v. Ohio*, the major stop-and-frisk decision, in which the Court authorized investigative stops—that is, brief on-the-street detentions accompanied by a frisk or patdown for weapons—upon less than probable cause for arrest The second case is *Schmerber v. California*, where the Supreme Court said that searches which breached the body wall (there, the extraction of blood by means of a hypodermic needle), intruding more upon the “interests in human dignity and privacy” than do external body searches, require greater justification. Together, *Terry* and *Schmerber* might support a general fourth amendment theory that increasing degrees of intrusiveness require increasing degrees of justification and increasingly stringent procedures for the establishment of that justification.⁴⁶⁹

Adopting a sliding scale approach could pose a variety of problems. Anthony Amsterdam notes that a sliding scale approach would likely “produce more slide than scale”⁴⁷⁰ and result in the Fourth Amendment becoming an “immense Rorschach blot.”⁴⁷¹ Moreover, if Fourth Amendment protections are calibrated to depend on the nature and seriousness of the alleged offense or threat involved, an innocent individual might find himself the subject of a warrantless search that is upheld as reasonable because the officer suspected the individual of acts relating to terrorism. In this post 9/11 era, an officer might be too quick to assume he is dealing with a terrorist suspect, which would enable him to search with a very low level of justification under a sliding scale approach.

Scott Sundby points out that a sliding scale approach could also decimate the already fragile remains of the warrant requirement:

[A] sliding scale model, placing complete emphasis on the reasonableness clause such that a reasonableness balancing test would apply to all searches and seizures, also poses significant problems. The model presents textual difficulties by failing to provide an independent role for the amendment’s one concrete requirement of a warrant based on probable cause. Under the sliding-scale model, the Court could conclude that the fourth amendment never required a warrant based on probable cause as a prerequisite to a reasonable search or seizure. Although the Court would probably not adopt such an extreme reading, the mere probability illustrates how the sliding-scale model fails to account for the warrant clause’s presence in the amendment’s text.⁴⁷²

At the other end of the spectrum, Richard Worf uses political process theory to argue for highly deferential judicial review, akin to rational basis

⁴⁶⁹ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 390 (1974).

⁴⁷⁰ *Id.* at 394.

⁴⁷¹ *Id.* at 393.

⁴⁷² Sundby, *supra* note 20, at 416–17; *see also* Alschuler, *supra* note 37, at 263 (“A view of the fourth amendment that treats probable cause as a unitary standard while authorizing departures from this standard when police intrusions seem relatively minor effectively makes warrants unavailable as a means of controlling the lesser or second-tier intrusions.”).

review, of searches authorized by legislative action.⁴⁷³ Worf starts from the assumption that a statute should prevail over a judge's interpretation of that statute.⁴⁷⁴ This is because "the majoritarian decision of the legislature should ordinarily be preferred to the decisions of unelected and unaccountable judges."⁴⁷⁵ In Worf's view, more stringent judicial review is justified "if, and only if, it has [a] democracy-enhancing effect."⁴⁷⁶ Thus, if a law burdens a discrete and insular minority, heightened judicial scrutiny may be necessary to "help to replicate the result that would have been obtained in a more perfect democracy where everyone is represented."⁴⁷⁷

Worf would recognize five exceptions to his general rule that courts should defer to the legislature and apply normal rational basis review when reviewing searches and seizures for constitutionality. He would support heightened judicial scrutiny when there is: (1) no legislative authorization for the challenged governmental action, (2) excessive executive discretion, (3) discrimination against a discrete and insular minority, (4) no rational basis, or (5) violation of an independent constitutional provision like the First Amendment.⁴⁷⁸ Because the run-of-the-mill Fourth Amendment case involves an individual police officer's decision to search or seize, heightened judicial scrutiny would seem to be appropriate in most Fourth Amendment cases even under Worf's scheme. Only in the arena of administrative searches where the legislature has authorized a broad-based type of search, such as checkpoints to check for sobriety and immigration checkpoints to check immigration status, would extremely deferential rational basis review apply. I am not persuaded that courts should ever completely defer to legislatures in the Fourth Amendment context, but do agree with Worf that in the five types of cases Worf identifies as exceptions to his general rule of judicial deference to the legislature, heightened judicial scrutiny is appropriate.

Sundby's composite model may be too complex to provide simple guidance to the average police officer in the field needing to know in advance what is required before he can perform a search or seizure and Slobogin's sliding scale approach may enable the police to engage in more warrantless searches and seizures than currently allowed. Nonetheless, I agree with both Sundby and Slobogin that heightened non-deferential judicial review of the constitutionality of most governmental searches and seizures is appropriate. Heightened scrutiny is far superior to the current

⁴⁷³ See generally Worf, *supra* note 446.

⁴⁷⁴ *Id.* at 101.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at 102.

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.* at 161–62.

balancing with a thumb-on-the-scale-in-favor-of-the-government that currently takes place.

Unlike Sundby, Slobogin, and others, I do not argue for a strict scrutiny standard of review because the Court has already rejected strict scrutiny in the Fourth Amendment context. The Court has on numerous occasions stated that the government is not required to use the least intrusive means available to be in compliance with the Fourth Amendment.⁴⁷⁹ In the administrative search context where there is an explicit evaluation of the purported governmental interest, the Court does not require that the governmental interest be “compelling” in the usual sense of the word in order to comport with the Fourth Amendment.⁴⁸⁰

Strict scrutiny may also be overly discretion-constraining. As noted above, in the equal protection context, whenever government action affects a suspect class or the exercise of a fundamental right, strict scrutiny is applied and the challenged regulation is almost always struck down.⁴⁸¹ If all Fourth Amendment claims are subject to strict scrutiny, either all but a few government searches would be deemed unreasonable or strict scrutiny would end up not being very strict. Just as police officers need discretion to decide what action is appropriate in the field, courts deciding Fourth Amendment claims need discretion to decide whether the challenged government action violated the Constitution. While the current balancing test provides too few constraints on the exercise of the reviewing court’s discretion, strict scrutiny may provide too many constraints. Something between a completely deferential rational basis standard and strict scrutiny is required. Reasonableness with teeth offers the advantage of heightened judicial scrutiny without the discretion-constraining limitations of strict scrutiny.

⁴⁷⁹ *City of Ontario v. Quon*, 130 S.Ct. 2619, 2632 (2010) (“This Court has repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment.”) (internal quotation omitted); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie City v. Earls*, 536 U.S. 822, 837 (2002) (“[T]his Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means”); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995) (“We have repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment.”); *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (“The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative ‘less intrusive’ means.”).

⁴⁸⁰ *Acton*, 515 U.S. 646, 661 (1995) (“It is a mistake, however, to think that the phrase ‘compelling state interest,’ in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern Rather, the phrase describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.”).

⁴⁸¹ *See supra* Part V.B

In proposing reasonableness with teeth, I do not suggest that the Court simply adopt wholesale the “rational basis with bite” standard that it has utilized in a minority of its equal protection cases. The problem with borrowing from the Court’s rational basis with bite jurisprudence is that the Court has provided little guidance regarding when rational basis with bite is appropriate and virtually no guidance with respect to what rational basis with bite means besides heightened judicial scrutiny of the challenged governmental action.⁴⁸² Moreover, the Court applies deferential rational basis review in most equal protection cases and applies rational basis with bite in only a small minority of cases.⁴⁸³

Reasonableness with teeth in the Fourth Amendment context does not have to suffer from these same flaws. First, it is unnecessary to limit reasonableness review with teeth to cases in which a politically unpopular group has been disadvantaged. Non-deferential reasonableness review should apply to all container searches, not simply those implicating the poor and the homeless. Since the Fourth Amendment requires that all searches and seizures be reasonable, not simply those directed at politically unpopular groups, reasonableness is already required for *all* searches and seizures. The only question is what form reasonableness review ought to take. Nothing in the Fourth Amendment requires that reasonableness review be ultra-deferential. Indeed, given the reasons why the Fourth Amendment was included in the Bill of Rights—the desire to constrain arbitrary and exploratory governmental searches and seizures—a non-deferential standard of review is more appropriate than deferential, pro-government review.

⁴⁸² See Pettinga, *supra* note 439, at 801 (arguing that because the Court has not articulated the factors that trigger rational basis with bite, it can apply heightened scrutiny whenever it chooses); Smith, *supra* note 439, at 2785 (noting that rational basis with bite has led to confusion in the lower courts with federal courts continuing to apply normal rational basis review and state courts more willing to apply rational basis with bite). The Court’s rational basis with bite jurisprudence is even more unsatisfying given its lack of “a harmonious principle obtainable from within the internal logic of the cases themselves.” Farrell, *supra* note 435, at 414. Gerald Gunther suggested that the rational basis with bite cases decided during the Court’s 1971 term might be explained by the Court’s focus on the means used by the government to achieve its ends. Gunther, *supra* note 434, at 21 (noting that under rational basis with bite, the challenged legislation passed constitutional muster as long as the means substantially furthered the legislative purpose whereas under strict scrutiny, the focus was on whether the government’s ends were compelling). In contrast, when the Court applies strict scrutiny, it focuses on the government’s objectives or ends. *Id.* In subsequent terms, however, the Court’s rational basis with bite cases have sometimes focused on the governmental ends and means and sometimes just on the governmental ends. Farrell, *supra* note 435, at 414–15.

⁴⁸³ Farrell, *supra* note 435.

Second, the factors relevant to whether a search should be deemed reasonable can and should be spelled out in advance, diminishing the problems of vagueness and lack of guidance that plague the current reasonableness balancing test in the Fourth Amendment.⁴⁸⁴ The Court can provide guidance to lower courts by specifying which factors lower courts should consider when conducting reasonableness review with teeth.⁴⁸⁵

Even if the Court does not provide lower courts with a list of relevant factors, the process of appellate decisionmaking can help bring determinacy to this area. Each time the Court decides a container search case using reasonableness with teeth, it will set precedent regarding what is or is not reasonable. To a certain extent, this is already being done in the administrative search context. The Supreme Court has made clear that sobriety checkpoints are reasonable,⁴⁸⁶ while checkpoints for narcotics interdiction are not reasonable.⁴⁸⁷ It has held that drug testing of high school athletes is reasonable,⁴⁸⁸ while drug testing of political candidates is not reasonable.⁴⁸⁹ And it is not just the Supreme Court that can provide guidance as to which kinds of searches are reasonable. The appellate courts can play a role here as well.

VI. CONCLUSION

In requiring police to get a warrant before searching a container, the Container Doctrine put containers on an equal footing with houses. It also

⁴⁸⁴ See Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1026 (“[A]bsent objective criteria for measuring reasonableness, progressively intrusive actions have been and will continue to be allowed”). Spelling out the factors that reviewing courts ought to consider when applying non-deferential reasonableness with teeth review is beyond the scope of this article. I plan to address this in a future article.

⁴⁸⁵ See, e.g., Bradley, *supra* note 126, at 1491 (listing factors that a reviewing court could consider when assessing a search for reasonableness); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483 (1995) (arguing that individualized suspicion should be a necessary component of reasonableness); Colb, *supra* note 38 (arguing that a strong showing of probable cause should be a prerequisite to a finding of reasonableness). But see Arcila, *supra* note 309, at 1224 (arguing against an individualized suspicion requirement in the administrative search context).

⁴⁸⁶ *Michigan v. Sitz*, 496 U.S. 444 (1990) (upholding sobriety checkpoints).

⁴⁸⁷ *Indianapolis v. Edmond*, 531 U.S. 32 (2000) (striking down checkpoints to check for narcotics).

⁴⁸⁸ *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie City v. Earls*, 536 U.S. 822 (2002) (upholding random drug testing of high school students participating in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding random drug testing of high school athletes).

⁴⁸⁹ *Chandler v. Miller*, 520 U.S. 305 (1997) (striking down random drug testing of candidates for political office).

reflected the Court's preference for warrants. Over the past several decades, the Court has gradually moved away from requiring warrants in most container search cases to permitting warrantless container searches. The erosion of the Container Doctrine mirrors the Court's embrace of reasonableness over warrants. Reasonableness review is problematic both because it is indeterminate and because it is highly deferential to the government. The erosion of the Container Doctrine is also problematic because it disproportionately harms the homeless and the urban poor.

It does not appear that the current Court is likely to go back to a strong embrace of the Warrant Preference view anytime soon. Given this reality, I suggest borrowing from a slice of the Court's equal protection jurisprudence and importing the concept of rational basis *with bite* into the Fourth Amendment context. When evaluating the reasonableness of a search or seizure—governmental action that has by definition intruded upon a reasonable expectation of privacy or possessory interests—reasonableness review should have some non-deferential teeth.